LEX ET SCIENTIA

International Journal

No. XIX, Vol. 1/2012

Published by „Nicolae Titulescu" University from Bucharest, „Nicolae Titulescu" Foundation of Law and International Relations, in cooperation with „Pro Universitaria" Publishing House

Internal CNCSIS Accreditation B+

Indexed by EBSCO-CEEAS Database, CEEOL Database and INDEX COPERNICUS Database

Included by BRITISH LIBRARY and INTUTE

http://lexetscientia.univnt.ro

contact: lexetscientia@univnt.ro

"Pro Universitaria" Publishing House

Phone: 004.021-314.93.15

Phone/Fax: 004.021-314.93.16

Str. Cobadin, No. 5, Bl. P14, sc. 1, ap. 3, sect. 5, Bucharest, Romania

CNCSIS Accredited Publishing House

ISSN: 1583-039X

CONTENTS

Lex ET Scientia. Juridical Series

THE CONCLUSION OF THE CONTRACT FROM THE PERSPECTIVE OF THE NEW CIVIL CODE
Stanciu D. Cărpenaru 7

SOME CONSIDERATIONS REGARDING THE JURIDICAL REGIME OF THE ACCESSION
Emil Molcuț, Ionuț Ciutacu 19

UNDER THE NEW CIVIL CODE: THE SALE CONTRACT IS TRANSLATED PROPERTY OR CREATOR ONLY OF OBLIGATIONS?
Liviu Stănciulescu 26

THE EUROPEAN MECHANISM FOR FINANCIAL STABILITY AND THE EURO-PLUS PACT
Augustin Fuerea 32

CASE-LAW ASPECTS CONCERNING THE REGULATION OF STATES OBLIGATION TO MAKE GOOD THE DAMAGE CAUSED TO INDIVIDUALS, BY INFRINGEMENTS OF EUROPEAN UNION LAW
Roxana-Mariana Popescu 41

THE ASYLUM, BETWEEN HUMANITARIAN RESPONSE AND POLITICAL INSTRUMENT
Catrinel Brumar 52

CONSTITUTIONAL DISPOSITIONS REGARDING LEGAL LIABILITY
Marta Claudia Cliza, Elena Emilia Ștefan 60

STANDARDIZATION OF JUDICIAL PRACTICE AND HARMONIZATION WITH THE ECTHR JURISPRUDENCE IN CRIMINAL LAW. THE SPANISH CRIMINAL JUSTICE SYSTEM
Lorena Bachmaier 69

THE DEVELOPMENT OF THE REGULATIONS ON GENDER BASED VIOLENCE IN ROMANIA AND SPAIN
Lavinia Mihaela Vlădilă 85

NEW TENDENCIES IN HUNGARIAN CRIMINAL JUSTICE
Erika Róth 101

PROCEDURAL IMPLICATIONS OF THE ILLEGAL ADMINISTRATION OF EVIDENCE DURING A CRIMINAL TRIAL
Bogdan-Florin Micu 107

THE NEW ROMANIAN CRIMINAL CODE – CHANGES SUGGESTED IN THE GENERAL PART
Mihai Adrian Hotca 116

VIOLATING THE RIGHT TO PRIVATE LIFE UNDER THE NEW ROMANIAN PENAL CODE
Mirela Gorunescu 128

LEX ET SCIENTIA. ECONOMICS SERIES

GROWTH OF COLLECTIVE INTELLIGENCE BY LINKING KNOWLEDGE WORKERS THROUGH SOCIAL MEDIA
Jaroslava Kubátová 135

ECONOMETRIC DETERMINATION OF VOTING BEHAVIOUR
Nicolae-Marius Jula, Nicoleta Jula 146

ECONOMIC CRISIS AND THE COMPETITIVENESS OF TRANSNATIONAL COMPANIES
Liviu Radu, Carmen Radu 154

BUSINESS OFFSHORING IMPLICATIONS ON THE LABOUR MARKET
Serghei Mărgulescu, Elena Mărgulescu..... 163

EU COMPARISON OF VAT
Maria Zenovia Grigore, Mariana Gurău 170

OVERVIEW OF THE COMPANY'S FINANCIAL STRUCTURE
Viorica Mirela Stefan-Duicu..... 181

THE IMPACT OF MANAGEMENT CONTROL ON THE HUMAN FACTOR AND CONSEQUENTLY ON ENTERPRISE PERFORMANCE
Nicoleta Cristina Matei, Marin Țole, Dumitru Mihai Nedelescu 187

THE CONCLUSION OF THE CONTRACT FROM THE PERSPECTIVE OF THE NEW CIVIL CODE

Stanciu D. CĂRPENARU*

Abstract

The New Civil Code regulates in large the general rules regarding the conclusion of the contract. These rules regard the formation of the contract, between parties that are either present or at a distance. The rules in question have as foundation the classical principles regarding the formation of the contract and also reflect the realities of the modern society.

Keywords: *offer to contract, offer's acceptance, offer's withdrawal, acceptance withdrawal, offer's ineffectiveness, closing of the contract*

1. Having as basis the dogma of will autonomy, The Romanian Civil Code of 1864 did not regulate formation of contract. Such loophole was partially covered, by The Commercial Code of 1887, which, in art. 35-39, regulated the conclusion of contract "between remote persons".

Taking into consideration this reality, the new Civil Code comprehensively regulated the general rules of form and contract (art. 1182-1203). These rules regard the conclusion of contract both between present persons and between absent ones.

The rules established by The Civil Code rely on the classic principles of contract conclusion, yet considering also the realities of modern society.

2. The contract is the will agreement between two or more persons intending to constitute, modify or terminate a legal relation (art. 1166 of The Civil Code).

Any natural or legal person may freely manifest their will, according to their interests, it being possible for them to conclude any contract, with any partner and having the contents the parties have agreed on, within the limits imposed by the law, public order and good customs.

Concluding the contract means, in essence, reaching the parties' will agreement on the contractual clauses.

The contract is concluded by the parties' simple will agreement, if the law does not impose a certain formality for its valid conclusion, such as in the case of real and solemn contracts.

Will agreement, which signifies the conclusion of the contract, is achieved by the concordant match of an offer to contract with the acceptance of such offer[1]. To this end, pursuant to art. 1182 of The Civil Code, the contract shall be concluded by its negotiation by the parties[2] or by acceptance without reference of an offer to contract.

---

* Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (e-mail: carpenaru_stan@yahoo.com).

[1] See C. Stătescu, C. Bîrsan, Civil Law, General Theory of Obligations, 9th Edition, revised and enlarged, Bucharest, Hamangiu Printing House, 2008, p. 37

[2] On contract negotiation, see Gh. Piperea, Introduction in Professional Contract Law, C.H. Beck Printing House, Bucharest, 2011, p.86 and the next; Mariana Buric, Legal Aspects of Contract Negotiation, in Revista de drept comercial no. 11/2004, p.114 and the next; Ivaniţa Goicovici, Progresive Formation of Contract – Notion and Scope, Walters Printing House, Bucharest, 2009; S. Deleanu, Letters of Interest, in Revista de drept comercial no. 1/C 995, p. 110 and the next.

As the contract is concluded by the parties' agreement, one party's will may not be replaced by court decision[3].

For the conclusion of the contract it is sufficient that the parties achieve the will agreement on the essential elements of the contract, even if some secondary elements are left aside in order to be agreed subsequently, and entrust their determination to third parties. If the parties do not reach an agreement on the secondary elements in question and the person entrusted with their determination makes no decision, it is the court of law the one that will complete the contract, at the request of any of the parties, taking into account, depending on the circumstances, the nature of the contract and the parties' intention.

Upon negotiating and concluding the contract, and also during the performance of the contract, the parties have to act in good faith, which is presumed until proved otherwise.

According to the law, the parties have the liberty to initiate, have and break off negotiations, without being responsible for their failure, if they responded to the exigencies of good faith. It goes without saying that the conduct of the party initiating or continuing negotiations without intending to conclude the contract is contrary to the exigencies of good faith.

Initiating, continuing or breaking off negotiations against good faith entail the liability of the breaching party for the damage caused to the other party. Liability cannot be but a civil liability *ex delicto*, in the conditions of art. 1357 of The Civil Code. Upon establishing the compensations, the expenses incurred for the negotiations, the other party's waiver of other offers and any other similar circumstances will be taken into account.

In the negotiation for the conclusion of the contract, the parties can have in view certain information with confidential character. In such a case, the law imposes on the parties a confidentiality obligation. The party that has been communicated, during negotiations, confidential information is forbidden to disclose it or use it in its own interest, no matter if the contract is concluded or not. The breach of the confidentiality obligation engages the civil liability *ex delicto*, under the conditions of art. 1357 of The Civil Code.

In certain cases, during the negotiations, a party can insist on reaching an agreement on a certain element or on a certain form. In such a case, the contract will not be concluded until an agreement is reached in connection to the above, no matter if the element in question is an essential or a secondary one or the form is not imposed by the law for the validity of the contract (art. 1185 of The Civil Code).

Conclusion of any contract involves the meeting of the essential conditions required by the law for the validity of the contract: the capacity to contract; the parties' consent; a determined and licit object; a licit and moral cause (art. 1179 of The Civil Code).

In those cases in which the law provides a certain form of the contract, this has to be observed, under the sanction provided by the applicable legal provisions. Consequently, the manifestations of will forming the will agreement, and namely the offer to contract and the acceptance of the offer, have to take the form required by the law for the valid conclusion of the contract (art. 1187 of The Civil Code).

3. The offer to contract is a proposal of a person, addressed to other person, to conclude a certain contract. This comprises a manifestation of will expressing the offeror's intention to obliges itself, in case of its acceptance by the recipient.

Pursuant to the law, in order to constitute an offer to contract, the proposal must contain sufficient elements for the contract formation (art. 1188 of The Civil Code).

[3] The High Court of Cassation and Justice, Commercial Section dec. no. 876/2002, in Revista română de drept al afacerilor no.3/2004, p.199

According to doctrine, the offer to contract must be manifestation of real, unvitiated will, concretized in a precise, complete and firm proposal[4].

The offer is precise and complete when it comprises all those elements that are necessary for concluding the contract, indispensible to the recipient of the offer for making a decision, in the sense of acceptance or rejection of the offer. These elements are not the same for any contract, being specific to the various categories of contracts.

The offer will be firm, if it expresses a legal engagement of the offeror, which, by its acceptance by the recipient, would lead to the conclusion of the contract. This condition is not met if the proposal comprises certain reserves.

The offer to contract can be exteriorized expressly, in writing, verbally, exhibit of the merchandise by displaying the price, or tacitly, resulting without any doubts from the behavior of a person; for example, the conclusion of the lease contract, in case of tacit relocation (art. 1810 of The Civil Code).

According to the law, the offer to contract may have as issuer the person who has the initiative to conclude the contract, which determines its contents or, depending on circumstances, the person that proposes the last essential element of the contract.

The recipient of the offer may be a determined person, generically determined persons or undetermined persons (the public).

In what regards the offer addressed to undetermined persons, the new legal regulation makes certain distinctions.

Pursuant to the law, the proposal addressed to undetermined persons, even if precise, is not equal to the offer to contract, but, depending on circumstances, request for offer or intention to negotiate (art. 1189 of The Civil Code).

Exceptionally, the proposal is equal to an offer if this results from the law, from usual practices or, undoubtedly, from circumstances, for example, standing of a taxi in the taxi stand, with the meter indicating "vacant". In these cases, the revocation of the offer addressed to the undetermined persons produces effects only if made in the same form with the offer or in a way allowing it to be known to the same extent with this; for example, the standing of the taxi in the taxi stand, with the meter indicating "occupied".

The request of undetermined persons or more determined persons to formulate offers does not stand, in itself, for the offer to contract. In such cases, the requesting party becomes the recipient of the offer.

The offer to contract represents a unilateral manifestation of will of its author. As provided by the law, the offer to contract produces effects only from the moment when it arrives at the recipient, even if this does not take note of the offer for reasons that are not imputable to it (art. 1200 of The Civil Code).

Consequently, until it arrives at the recipient, the offer produces no effects, and can be withdrawn without consequences for the offeror, but only if the withdrawal arrives at the recipient prior to or simultaneously with the offer.

It goes without saying that, if the offer makes provision for an acceptance term, the offeror must comply with the term granted. The acceptance term elapses from the moment when the offer arrives at the recipient.

For the purpose of this solution, art. 1191 of The Civil Code provides that the offer is irrevocable as soon as its author undertakes to maintain it for a certain term.

[4] See C. Stătescu, C. Bîrsan, op.cit., p.41; L. Pop, p.41; L. Pop, Civil Law Treaty. Obligations, Volume II, The Contract, Universul Juridic Printing House, Bucharest, 2009, p.156-160; Albu, Civil Law. The Contract and the Contractual Liability, Dacia Printing House, Cluj-Napoca, 1994, p.72-73

Yet, pursuant to the law, the offer is also irrevocable when it may be considered as such, under the parties' agreement, under the practices settled between them, negotiations, contents of the offer or usual practices.

One should note that, whereas the term offer is irrevocable, any statement for revocation of such an offer produces no effect (art. 1191, paragraph 2 of The Civil Code).

The matter that has been discussed in the past and that is also currently debated regards the offer without acceptance term. The new Civil Code establishes the fundamental doctrine solutions, distinguishing between the offer being addressed to a present person or to an absent one.

If the offer without acceptance term is addressed to a present person, this remains without legal effects if not accepted immediately (art. 1194 of The Civil Code).

The solution is the same also in the case of the offer transmitted by phone or by other means of remote communication.

If the offer without acceptance term is addressed to a person that is not present, this has to be maintained in a reasonable term, depending on circumstances, in order for the recipient to receive it, analyze it and dispatch the acceptance (art. 1193 of The Civil Code).

Such an offer can be revoked and prevents the conclusion of the contract, but only if revocation arrives at the recipient before the offeror receives the acceptance or, as the case may be, before carrying out the act or fact determining the conclusion of the contract, under the terms and conditions of art. 1186, paragraph 2 of the Civil Code.

Revocation of the offer before the expiry of the reasonable term, provided by art. 1193 of the Civil Code, engages the offeror's liability for the damage caused to the recipient of the offer (art. 1193, paragraph 3 of The Civil Code).

In the past, against the background of inexistence of any regulation in The Civil Code, there were discussions on the mandatory force of the offer and the grounds for liability for revocation of the offer[5].

Both doctrine and judicial practice admitted that the withdrawal of the offer, before the expiry of the acceptance term provided by the offer entails the offeror's liability for the damages caused as a consequence of the unexpected revocation of the offer. The issue that was subject to the controversy was the legal ground of the offeror's liability.

In general, it has been sustained that unexpected revocation of the offer, which causes damages, entails the civil liability *ex delicto* of the offeror (art. 998 of the old Civil Code)[6].

Some authors considered that the legal ground for liability is not the illicit and guilty deed of revocation, but the legal fact of the abusive exercising of the right to revoke the offer[7].

Other authors found the justification of the obligation to maintain the offer in the term provided by the offer, in the idea of validity of the unilateral will engagement representing the offer to contract[8].

The new Civil Code comprises provisions regarding the offeror's liability for the damage caused by the revocation of the offer (art. 1193, paragraph 3 of The Civil Code).

Still, one should note that this liability of the offeror regards the case of the offer without term addressed to an absent person, which was revoked before the expiry of the reasonable term considered by the law for the recipient to receive it, analyze it and dispatch the acceptance.

---

[5] See T. R. Popescu, P. Anca, General Theory of Obligations, Ed. Ştiinţifică, Bucharest, 1968, p.75 and the next; C. Stătescu, C. Bîrsan, op.cit., p.41-44; L. Pop, op.cit., p.167 and the next.

[6] See T. R. Popescu, P. Anca, op.cit., p.78

[7] See C. Stătescu, C. Bîrsan, op.cit., p.44

[8] See I. Albu, op.cit., p.75; D. Chirica, Civil and Commercial Special Contracts, Volume I, Rosetti Printing House, Bucharest, 2005, p.145; L. Pop, op.cit., p.172.

As regards the offer in which the offeror undertook to maintain it for a certain term, this is, pursuant to art. 1191 of The Civil Code, immediately irrevocable. Moreover, any statement of revocation of the irrevocable offer produces no effect (art. 1191, paragraph 2 of The Civil Procedure Code).

As the offer with acceptance term cannot be revoked by the offeror, and any revocation produces no effects, it means that the offer "revoked" before the expiry of the term can be accepted and, consequently, leads to the conclusion of the contract.

As regards the liability of the offeror for the damage caused by the offer revocation, in the conditions of art. 1193 of The Civil Code, its ground is the illicit and guilty deed of the offeror (art. 1357 of The Civil Code).

In certain cases, the offer to contract may become null and, therefore, may no longer produce legal effects. The cases of nullity of the offer are the ones provided by art. 1195 of The Civil Code.

Thus, the offer will become null if the acceptance of the offer does not get to the offeror in the term laid down in the offer or in the reasonable term provided by art. 1193, paragraph 1 of The Civil Code.

Then, the offer becomes null when refused by the recipient.

Finally, the irrevocable offer becomes null in case of the offeror's decease or incapacity, but only when the nature of the business or circumstances impose so.

To conclude here, it has to be specified that the offer to contract should not be mistaken for the promise to contract (sale promise). Unlike the offer, which is a unilateral manifestation of will, the promise to contract (sale promise) is a pre-agreement (art. 1669 of The Civil Code).

In the case of bilateral sale promise, the promissory party undertakes to sell, and the beneficiary undertakes to buy a certain asset, at a certain price, based on a sale-contract to be concluded in the future.

In the case of the unilateral sale promise, the promissory party undertakes to sell, or, as the case may be, to buy a certain asset, and the beneficiary reserves the faculty to subsequently manifest the will to purchase, respectively to sell the promised asset.

In both cases, the sale promise is a pre-agreement giving rise to an affirmative covenant, and namely that of concluding a sale contract in the future.

4. Acceptance of the offer is the manifestation of will of the recipient of the offer to conclude the contract in the conditions provided by the offer.

Pursuant to art. 1196 of The Civil Code, acceptance of the offer means any act or fact of the recipient, if it undoubtedly indicates its consent to the offer, as formulated, and arrives in due term at the offer author.

The conditions required by the law for the validity of acceptance of the offer result from this definition.

Thus, the acceptance of the offer may consist in a legal act, and namely a manifestation of the recipient's will, in the sense of conclusion of the contract, or in a legal fact, such as the dispatch of the merchandise to which the offer refers.

Then, from the recipient's act or fact it must undoubtedly result the recipient's consent with regard to the offer, as formulated by the offeror.

Consequently, in order for it to stand for an acceptance, the recipient's manifestation of will cannot be confined to the confirmation of the receipt of the offer, but it has to undoubtedly express the recipient's will to legally engage, and namely to conclude the contract in the conditions proposed in the offer[9]. This means that acceptance must be total and have no reserves or conditions.

[9] See The High Court of Cassation and Justice, Commercial Section dec. no.35/2009, in Buletinul Casației no.3/2009, p.33

According to the law, the recipient's answer does not represent acceptance when it comprises amendments or supplementations that do not correspond to the offer received (art. 1197, paragraph 1, letter a) of The Civil Code).

An answer of the recipient comprising changes or supplementations to the contents of the offer may be considered, depending on circumstances, a counter offer (art. 1197, paragraph 2 of The Civil Code).

Doctrine has sustained the necessity to distinguish between the essential and non-essential amendments and supplementations comprised by the acceptance of the offer and that only in the case of essential amendments and supplementations, acceptance should have the value of a counter offer. As regards the non-essential amendments and supplementations, if the offeror does not immediately manifest its disagreement with them, the contract should be considered concluded in the terms of the recipient's acceptance[10].

In supporting this solution, one could invoke the provisions of art. 1182, paragraph 2 of The Civil Code, pursuant to which in order to conclude the contract it is sufficient for the parties to reach an understanding on the essential elements of the contract, even if they leave aside certain secondary elements to be subsequently agreed on.

Still, we consider that it is only the recipient's agreement with regard to the offer, as formulated by the offeror, that leads to the conclusion of the contract. Any amendment or supplementation, even if a non-essential one, involves an insecurity element in what regards the conditions of the conclusion of the contract. Therefore, an acceptance with any amendment or supplementation represents a counter offer addressed by the recipient to the offeror, which can be accepted or rejected.

Finally, in order for it to have legal value, the acceptance of the offer must reach the author of the offer in due term.

Acceptance of the offer will be legally inappropriate, if it reaches the offeror after the offer has become null (art. 1197, paragraph 1, letter c) of The Civil Code).

According to the law, the offer will become null if the acceptance does not reach the offeror in the term set out in the offer or, in absence, in the reasonable term, necessary for the recipient to receive it, analyze it and dispatch the acceptance (art. 1195 of The Civil Code).

The offer will also become null if this is refused by the recipient or in case of the offeror's decease or incapacity.

One should show that, according to the law, also tardy acceptance, and namely that has reached the offeror after the term set out in the offer or after the reasonable term contemplated by the law, may lead to the conclusion of the contract.

Tardy acceptance produces effects, i.e. leads to the conclusion of the contract, only if the author of the offer immediately informs the accepting party of the conclusion of the contract (art. 1198 of The Civil Code).

For the case in which the acceptance was performed in due term, but it reached the offeror after the expiry of the term, for reasons that cannot be imputed to the accepting party, the law provides that such an acceptance will produce legal effects, and namely will lead to the conclusion of the contract, if the offeror does not immediately inform the accepting party accordingly.

For the conclusion of the contract, acceptance of the offer, like the offer itself, has to take the form required by the law for the valid conclusion of the contract.

If by the offer a certain form of the acceptance of the offer has been established, acceptance will be inappropriate if it does not comply with the required form and, therefore, produces no legal effects (art. 1197, paragraph 1, letter b) of The Civil Code).

[10] See L. Pop, op.cit., p.176

Like the offer, acceptance of the offer may be express or tacit.

Express acceptance of the offer may manifest itself by a written record or verbally or by certain gestures signifying the recipient's agreement to the received offer.

Tacit acceptance consists in an act performed by the recipient involving the idea of conclusion of the contract in the conditions formulated in the offer; for example, dispatch of the merchandise to which the purchase offer refers or payment of the price of the merchandise received from the seller.

The problem that has been discussed in the past was that of knowing whether the acceptance of the offer can result from the recipient's silence. Doctrine distinguished between silence accompanied by positive attitudes and simple silence of the recipient[11].

In the case of silence accompanied by positive attitudes of the recipient, silence means, in fact, tacit acceptance; for example, dispatch of the merchandise object of the offer.

In case of pure and simple silence, silence cannot have the significance of acceptance of the offer, whereas the principle "who is silent, consents" does not apply in law.

Exceptionally, doctrine admitted that silence can have the value of acceptance of the offer in the cases provide by the law or agreed by the parties or when the offer is made exclusively in the recipient's interest[12].

The solutions of the doctrine have been taken over and recognized in the new civil code. Pursuant to art. 1196, paragraph 2 of The Civil Code, the recipient's silence or inaction stands for acceptance only when it results from the law, from the parties' agreement, from the practices settled between them, from usual practices or from other circumstances.

A known case provided by the law in which silence is equal to acceptance of the offer is tacit relocation.

Art. 1810 of The Civil Code provides that if, after the elapsing of the term, the lessee continues to hold the asset and to fulfill the obligations without resistance on the lessor's part, it shall be considered that a new lease has been concluded, in the conditions of the old one, including in what regards the guarantees.

In commercial activity there may be legal relations between certain partners with continuity, and for facilitating the conclusion of contracts, they agree to conclude them in the simplified form, by order followed by execution, without there being necessary a formal acceptance of the order. Such an understanding between partners may lead to the establishing of practices between them, which makes superfluous the acceptance of the offers.

In certain areas of activity, usual practices can impose that the recipient's silence be equal to the acceptance of an offer to contract.

Acceptance of the offer must be communicated to the offeror. Communication must be made by means at least as fast as the ones used by the offeror for transmitting the offer, if by the law, from the parties' agreement, from the practices settled between them or from other such circumstances does not result otherwise (art. 1200, paragraph 2 of The Civil Code).

It being a unilateral manifestation of will, acceptance of the offer produces effects only from the moment at which it gets to the offeror, even if this does not become aware of the same for reasons that are not imputable to it. Consequently, the recipient may withdraw the acceptance of the offer, provided that the withdrawal reaches the offeror previously or simultaneously to the acceptance (art. 1199 of The Civil Code).

[11] See T. R. Popescu, P. Anca, op.cit., p.74; I. Albu, op.cit., p.76

[12] See C. Stătescu, C. Bîrsan, op.cit., p.47-48; L. Pop, op.cit., p.179-181

5. Conclusion of contract implies the achievement of the parties' will agreement on the contract clauses.

As showed, the parties' will regarding the conclusion of the contract manifests itself in the offer to contract and the acceptance of the offer.

If these two manifestations of will are concordant, the will agreement is achieved, i.e. the contract is concluded.

The matter brought forward by the conclusion of the contract is that of the moment of achievement of the agreement of will, as this represents the moment of conclusion of the contract.

In absence of a legal regulation in the old civil code, establishing of the moment of conclusion of the contract between absent parties was the subject of a controversy.

Civil and commercial law doctrine has proposed several theories (systems) regarding the determination of the moment of conclusion of the contract between absent parties[13].

According to the **theory of issuing**, named also the **will declaration theory**, the contract shall be considered concluded at the moment when the recipient has manifested its will to accept the offer received, even if such offer was not communicated to the offeror.

This theory was criticized for not allowing to establish exactly the acceptance moment and, therefore, the moment of the contract conclusion. Moreover, this does not offer any certainty, because, not being known to the offeror, acceptance may be revoked.

According to the **theory of dispatching**, also named the **transmission theory**, the contract should be concluded at the moment when the recipient dispatches the answer regarding the acceptance to the offeror.

The theory has been contested for not ensuring total certainty of contract conclusion, whereas, although the acceptance of the offer was dispatched to the offeror, its author can revoke it until the arrival of the acceptance at the offeror, using a faster means of communication. At the same time, by applying this theory, the offeror takes note of the conclusion of the contract after the moment when the same took place, and namely upon the receipt of acceptance of the offer.

In the **theory of receiving**, also named the **theory of acceptance receipt**, the contract is considered concluded at the moment when the offeror receives the answer regarding the acceptance of the offer, even if the offeror did not take note of such answer.

It has been showed that, although it offers a higher guarantee regarding the certainty of the moment of contract conclusion, still, the inconvenience of this theory lies in the fact that it considers the contract concluded, even in the case in which the offeror is not aware that the offer has been accepted[14].

Finally, according to the **theory of informing**, named also the **theory of knowledge of the acceptance**, the contract should be considered concluded at the moment when the offeror actually becomes aware of the acceptance of the offer.

This theory found legal support in art. 35 of The Commercial Code, according to which synallagmatic contract shall not be considered concluded "if acceptance was not brought to the notice of the proposing party". In other terms, the contract is considered concluded at the moment when the offeror becomes aware of the acceptance of the offer.

In relation to the theory of informing in has been objected, for good reason, that this does not ensure the possibility to exactly establish the moment when the offeror became aware of the acceptance of the offer. Moreover, by relating the moment of conclusion of the contract to the moment of actual knowledge of the acceptance of the offer one creates the possibility for the offeror

[13] See C. Stătescu, C. Bîrsan, op.cit., p.49-50; L. Pop, op.cit., p.186 and the next. See also St. D. Cărpenaru, Romanian Commercial Law Treaty, p.451-453

[14] The theory of receiving was adopted by the United Nations Convention on Contracts for the International Sale of Goods (art.18 item 2), Vienna, 1980

to prevent the conclusion of the contract, by not opening the correspondence containing the acceptance of the offer.

Considering its advantages, but also the objections to it, the theory of informing has been applied in practice, using the simple presumption that the offeror has taken note of the acceptance of the offer at the moment of receipt of the answer regarding the acceptance of the offer. As presumption is relative, it could be overthrown by contrary evidence, in the sense that, without being in a breach situation, the offeror has not become aware of the acceptance of the offer upon the receipt of the correspondence, but at another date.

By applying in this manner the theory of informing, practically one applies the theory of receiving, considered the most correct both theoretically and practically and, for such reason, recommended for being adopted in future civil legislation[15].

Taking into account the past situation, the new civil code adequately regulates the moment of conclusion of the contract.

In the case of the contract that is concluded between present persons, in which case each party's will is received by the other party directly and instantaneously, the contract shall be considered concluded at the moment of acceptance of the offer. To this end, art. 1194 of the Civil Code provides that the offer without term addressed to a present person remains effectless if not immediately accepted.

The solution is the same also in the case of the offer transmitted by phone or by other such means of remote communication.

In the case of the contract concluded between the persons that are absent, in which case the offer and the acceptance of the offer will be communicated by correspondence (letter, phone, fax) and, consequently, there is a time interval between the offer and acceptance, the contract will be considered concluded at the moment when the acceptance of the offer arrives at the offeror. To this end, pursuant to art. 1186 of The Civil Code, the contract will be concluded at the moment and in the place in which acceptance arrives at the offeror, even if this does not take note of it for reasons that are not imputable thereto.

As one can notice, in relation to the moment of conclusion of the contract between absent parties, the new Civil Code provides for the theory of receiving.

In order to ensure full certainty and exactness of the moment of contract conclusion, the new regulation is more categorical; in all cases, the contract is considered concluded at the moment when the answer regarding the acceptance arrives at the offeror, even if the offeror does not become aware of the answer for reasons that are not imputable thereto.

The new Civil Code regulates the moment of conclusion of the contract in simplified form (art. 1186, paragraph 2 of The Civil Code).

In the case in which, according to the offer, practices settled between the parties, usual practices or nature of the business, the offer may be accepted by a conclusive act or fact of the recipient without informing the offeror any longer of the acceptance of the offer, the contract will be considered concluded at the moment when the recipient performs the conclusive act or fact (for example, dispatch of the merchandise that is the object of the offer).

Establishing the moment of the contract is of interest not only theoretically, in relation to the conclusion of the contract, but also practically.

Thus, the effects of the contract produce from the moment of its conclusion, except for the cases in which the parties have agreed otherwise.

Then, at the moment of conclusion of the contract, one assesses the meeting of the validity conditions of the contract (capacity, consent flaws etc.).

[15] C. Stătescu, C. Bîrsan, op.cit., p.50

Also, in relation to the moment of conclusion of the contract, one determines the law applicable to the contract with extraneity elements.

Finally, the moment of conclusion of the contract serves to determining the venue of conclusion of the contract.

The new Civil Code regulates not only the moment of contract conclusion, but also the venue of contract conclusion between absent parties.

According to art. 1186 of The Civil Code, the contract shall be concluded at the moment and in the venue in which acceptance arrives at the offeror. So the venue of contract conclusion is the locality where the offeror is and where acceptance of the offer arrives at the offeror.

We consider that this solution of the law is applicable also in the case of conclusion of the contract by phone or by other such means of remote communication.

In the case of conclusion of the contract in simplified form, when the contract is considered concluded at the moment when the recipient performs a conclusive act or fact (for example, dispatch of the merchandise that is the object of the offer), the venue of conclusion of the contract is the locality where the recipient of the offer is (art. 1186, paragraph 2 of The Civil Code).

Determining the venue of contract conclusion is of practical interest.

Thus, depending on the venue of contract conclusion one determines the competence of the court of law (territorial competence) for the resolution of the disputes regarding the contract.

Then, the venue of contract conclusion is of interest for determining the applicable law, in the case of a conflict of laws in space regarding the contract with extraneity elements.

6. By concluding the contract, the parties agree on the contract clauses, which synthesize each party's obligations.

Of course, the parties are bound by the obligations assumed by the contract clauses, which express their will.

The new Civil Code regulates also the legal regime of special clauses regarding the conclusion of the contract. The external clauses, the standard clauses and the unusual clauses are being contemplated.

The contract concluded by compliance with the law obliges not only to what is expressly stipulated, but also to all the consequences that the practices settled between the parties, usual practices, law or equity confer on the contract, depending on their nature.

Pursuant to the law, the parties shall be also bound by the extrinsic clauses to which the contract refers, if the law does not provide otherwise (art. 1201 of The Civil Code).

The law has in view also the conclusion of contracts using standard clauses (art. 1202 of The Civil Code). These standard clauses are stipulations previously established by one of the parties in order to be generally and repeatedly used and that are included in the contract without having been negotiated with the other party; for example, the general conditions regarding the leasing contract.

In principle, the conclusion of the contract in which standard clauses are used is governed by the general rules for the conclusion of the contract, provided by art. 1178-1203 of The Civil Code, which apply accordingly.

But, according to the law, the clauses negotiated prevail over the standard clauses.

In the case in which both parties use standard clauses and do not come to an agreement regarding such clauses, the contract will be still concluded based on the agreed clauses and on any standard clauses that are common in their substance. The contract shall not be concluded if either of the parties notifies the other party, either before the moment of conclusion of the contract, or afterwards and immediately, that it does not intent to be bound by such a contract (art. 1202, paragraph 4 of The Civil Code).

In order to ensure the parties' protection, upon the conclusion of the contract, the law especially regulates the legal regime of unusual standard clauses. There are contemplated the clauses providing for the benefit of the one proposing them the limitation of liability, the right to unilaterally terminate the contract, to suspend the fulfillment of the obligations or providing to the detriment of the other party the losing of rights or from the benefit of the term, limitation of the right to oppose exceptions, restriction of the liberty to contract with other persons, tacit renewal of the contract, applicable law, arbitration clauses or clauses by which one derogates from the norms regarding the competence of the courts of law.

Such unusual standard clauses produce effects only if expressly accepted in writing by the other party (art. 1203 of The Civil Code).

7. All that have been showed above lead to the **conclusion** that the regulation of the new Civil Code regarding the conclusion of the contract stands for actual progress in comparison with the previous legal regulation.

Even if, in many cases, the solutions adopted are not a novelty towards the solutions accepted by the civil law and commercial law doctrine, as well as by the judiciary practice, they have the merit of offering legal support and, therefore, a guarantee for the security of contractual relations.

References

Treaties, university courses, monographic courses

- St. D. Cărpenaru, Romanian Commercial Law Treaty, Universul Juridic Printing House, Bucharest, 2010;
- C. Stătescu, C. Bîrsan, Civil Law, General Theory of Obligations, 9th Edition, revised and enlarged, Bucharest, Hamangiu Printing House, 2008, p. 37;
- Gh. Piperea, Introduction in Professional Contract Law, C.H. Beck Printing House, Bucharest, 2011;
- Ivanița Goicovici, Progresive Formation of Contract – Notion and Scope, Walters Printing House, Bucharest, 2009;
- L. Pop, Civil Law Treaty. Obligations, Volume II, The Contract, Universul Juridic Printing House, Bucharest, 2009;
- Albu, Civil Law. The Contract and the Contractual Liability, Dacia Printing House, Cluj-Napoca, 1994;
- T. R. Popescu, P. Anca, General Theory of Obligations, Ed. Științifică, Bucharest, 1968;
- D. Chirica, Civil and Commercial Special Contracts, Volume I, Rosetti Printing House, Bucharest, 2005;

Articles

- Mariana Buric, Legal Aspects of Contract Negotiation, in Revista de drept comercial no. 11/2004;
- S. Deleanu, Letters of Interest, in Revista de drept comercial no. 1/C 995;

Jurisprudence

- The High Court of Cassation and Justice, Commercial Section dec. no. 876/2002, in Revista română de drept al afacerilor no.3/2004;
- The High Court of Cassation and Justice, Commercial Section dec. no.35/2009, in Buletinul Casaţiei no.3/2009;

Legislation

- The United Nations Convention on Contracts for the International Sale of Goods (art.18 item 2), Vienna, 1980

SOME CONSIDERATIONS REGARDING THE JURIDICAL REGIME OF THE ACCESSION

Emil MOLCUȚ[*]
Ionuț CIUTACU[**]

Abstract

The juridical institution of the accession derives its origin from the norms of the Roman private law that consecrated the criteria according to which a property is defined as being principal or accessory. In agreement with these criteria - of a patrician origin - a property was considered to be principal when it did not lose its individuality after the accessory was incorporated to it. This rule was taken over by the Romanian legislator since 1864. But, once the new Civil Code was adopted in 2011 a redefinition of the criteria concerning the two properties was specified: the most valuable property will be considered as principal; this redefinition will become the law for the mentality of a whole social category.

Keywords: *roman private law, accession (lat. accessio), ancient civil code, new civil code, criteria of classifying the principal property and the accessory.*

Introduction

The main concern of this essay is about the juridical institution of accession (*accessio)* from the moment it was consecrated in the Roman juridical texts up to the moment when the Romanian law-maker adopted a New Civil Code. This juridical institution supposes the absorption of the accession by the principal property or, from this point of view the Romanian New Civil Code brings forth certain new elements concerning the accession, establishing new ways of defining the principal and the accessory property. This new element is very important, as the owner of the principal property will get - by virtue of accession - the ownership over the accessory asset. A deeper analysis of the provisions of the New Civil Code points to a certain alienation from the ancient Romanian juridical tradition - that was taken over by the provisions of the Civil Code adopted in 1864 - although the juridical form of its specificity was maintained in the chapter about the accession. Consequently, the factors determining a certain juridical regulation were changed.

The research envisaged by this essay raises a series of fundamental questions: which were the reasons that imposed the change of the factors determining the content of a juridical norm or, whom does this modification serve to? At the same time, our approach to the problem will prove its utility by underlining the aim of the new legislative policy in the domain of accession.

The analysis of the objectives in view is divided into four sections. The first section of the essay will deal with the Roman private law which had established the accession in agreement with the old Roman conception about ownership. The second section will devote to the analysis of certain norms from Andronache Donici's Juridical Manual, „Amendments to the Law" and from Calimah's Code, as to notice the modifications appeared, in the feudal age, in this domain. The third section will analyze the way in which the accession and the specification were defined in certain codes adopted in

[*] Professor, Ph.D, Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania.
[**] Senior Lecturer, Ph.D, Faculty of Juridical and Administrative Sciences, "Dimitrie Cantemir" Christian University, Bucharest, Romania (e-mail: ionutciutacu@yahoo.com).

the modern and contemporary periods. The fourth section deals with the present juridical regulations, that is, with the Romanian New Civil Code. On this occasion, one can notice that the norms of the present regulations go toward another end meant to reflect the mentality of the important owners of capital.

The adoption and enforcement of the New Civil Code, on October 1, 2011, is an important event as the new juridical regulation includes both the latest legislative innovations in the domain of the civil law as well as the results of the theories formulated by the specialized juridical literature. Yet, the researchers of the juridical phenomenon did not insist on the factors that determined the appearance and evolution of the juridical profile of the accession.

I. The accession in the Roman private law

The millenary evolution of the Roman private law is due to several elements. One of them is the ownership together with all the aspects it involves. The Roman jurisconsults sanctioned, to the lesser details, the juridical institution of ownership and, implicitly, the ways of acquiring it, as they understood the fundamental importance of how to protect ownership. It appeared to be a really necessary measure as the numerically larger the population and the more intricate and complex social relationship, the more the Romans were forced to conclude juridical agreements with the inhabitants of the cities, inclusively; that was the moment which generated the possible appearance of a new chapter in the Roman private law: the law of nations[1] to which the juridical institution of accession is owed.

In the everyday language, accession was given the sense of adjunction or mixture[2]. Nevertheless, the Roman jurisconsults envisaged this modality for obtaining the ownership. In their view, the accession meant the incorporation of the accessory thing into the principal thing, with no possibility for the latter to lose its own identity. In other words, the accessorial thing had to have the same fate as the principal thing in agreement with the rule of *accesorium sequitur principale*[3]. This modality was sanctioned by the Roman juridical texts for those situations in which the accession meant the unification of two immovables, of a movable with an immovable or of two movables. If speaking about the first situation, one can easily notice that the alluvion[4] and the strip of land torn off by the waters[5] can be considered accessory thing as reported to the riparian territory of the owner,

[1] Aurel N. Popescu, trans., *Gai Institutiones* (Bucureşti: Editura Academiei RSR, 1980), 141-142; Vladimir Hanga, trans., *Iustiniani Institutiones* (Bucureşti: Editura Lumina Lex, 2002), 64-74.

[2] Ioan Nădejde şi Amelia Nădejde Gesticone, *Dicţionar latin-român complect pentru licee, seminarii şi universităţi* (Iaşi: Editura „Viaţa Romînească", 1927), 6; C. Accarias, *Précis de droit romain*, tome premier (Paris: Librairie Cotillion, 1891), 634; Constantin St. Tomulescu, *Drept privat roman* (Bucureşti: Tipografia Universităţii, 1973), 185.

[3] I. C. Cătuneanu, *Curs elementar de drept roman* (Cluj-Bucureşti: Editura „Cartea Românească", 1927), 246; D 6. 1. 23. 4-6; D 41. 1. 26. 1.

[4] „But, in agreement with the same law, it can also be ours whatever is added by alluvia; alluvion is another natural mode of acquisition. Alluvion is an addition of soil to land by a river, so gradual that at a particular moment the amount of accretion cannot be determined; or, to use the common expression, an addition made by alluvion is so gradual as to elude our sight." - *Gai Institutiones* II. 70.

„Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition; and that which is added so gradually that you cannot perceive the exact increase from one moment of time to another is added by alluvion." - *Iustiniani Institutiones* 2. 1. 20.

[5] „Accordingly a parcel of your land swept away by a river, and carried down to mine, continues your property." - *Gai Institutiones* II. 71.

„If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour it clearly remains yours; though of course if in the process of time it becomes firmly attached to your neighbour's land, they are deemed from that time to have become part and parcel thereof." - *Iustiniani Institutiones* 2. 1. 21.

which is considered to be the principal thing. In the case of the unification of a movable with an immovable the *superficies solo cedit* rule is applied, in the virtue of which the owner of the ground will get the estate for the building, irrespective of the fact that the building was erected with foreign materials[6] or by another person[7]. In case of the unification of two movables, the accessory thing will be incorporated to the principal thing so as to become its integrant part[8] even if the latter is less precious[9]. Later, together with the assertion of the school of Proculus, the Romans admitted that the picture painted on another's canvas can be considered as principal, because the painting made by a notable painter cannot be incorporated as an accessory to a less valuable painting[10] although, with no canvas the painting could not exist. This instant will become crucial in the evolution of the private law, as it is the first step in achieving a profound turn in the physiognomy of the juridical institution of accession.

II. Accession in the ancient Romanian Law

This juridical institution is often to be traced back to the origins of the ancient Romanian law. Among these, only the „Amendments to the Law", Andronache Donici's Juridical Manual and Calimach's Code are to be mentioned.

With the exception of the first regulation, the others define both the accession relatively to immovables and movables. To adopt the Juridical Manual of Andronache Donici and the Code of Calimach is considered to be an important step in the history of the Romanian law because, according to the French law, the chapter concerning accession will include dispositions specific to other juridical situations, as specification and mixture.

The „Amendments to the Law" regulates only that clause which refers to the unification of a movable with an immovable, borrowing from the Roman law the *superficies solo cedit* rule, because „any one who builds a house on an another's land on his own account, in as far as the wood and expenses are concerned, that person shall know that he is the one to administer the land and the house, as written in the law which says that the upper ones will be victorious over the lower ones"[11].

---

[6] „If a man builds upon his own ground with another's materials, the building is deemed to be his property, for buildings become a part of the ground on which they stand." - *Iustianiani Institutiones* 2. 1. 29.

[7] „Again, a building erected on my soil, though the builder has made it on his own account, belongs to me by natural law; for the ownership of a superstructure follows the ownership of the soil." - *Gai Institutiones* II. 73.

„On the other hand, if one man builds a house on another's land with his own materials, the house belongs to the owner of the land." - *Iustiniani Institutiones* 2. 1. 30.

[8] Paul Frederic Girard, *Manuel élémentaire de droit romain* (Paris: Librairie Arthur Rousseau, 1924), 342.

[9] „On the same principle, the writing inscribed on my paper or parchment, even in letters of gold, becomes mine, for the property in the letters is accessory to the paper or parchment." - *Gai Institutiones* II. 77.

„Writing again, even though it be in letters of gold, becomes a part of the paper or parchment, exactly as buildings and sown crops become part of the soil, and consequently if Titius writes a poem, or a history, or a speech on your paper and parchment, the whole will be held to belong to you, and not to Titius." - *Iustiniani Institutiones* 2. 1.33.

„The canvas belonging to me, on which another man has painted, e. g. a portrait, is subject to a different rule, for the ownership of the canvas is held to be accessory to the painting: **a difference which scarcely rests on a sufficient reason.**" - *Gai Institutiones* II. 78.

„Moreover, anything which is written on my paper or painted on my board, immediately becomes mine; although certain authorities have thought differently on account of the value of the painting; but where one thing can not exist without the other, it must necessarily be given with it." - *Iustiniani Digesta* 6. 1. 23. 3**.**

[10] „Where, on the other hand, one man paints a picture on another's board, some think that the board belongs, by accession, to the painter, others, that the painting, however great its excellence, becomes part of the board. The former appears to us the better opinion, for it is absurd that a painting by Apelles or Parrhasius should be an accessory of a board which, in itself, is thoroughly worthless" - *Iustiniani Institutiones* 2. 1. 34.

[11] Andrei Rădulescu et al., *Îndreptarea legii* (Bucureşti: Editura Academiei, 1962), 290.

The same law will be taken over by the provisions of the Juridical Manual of Andronache Donici[12] and that of the Calimach's Code[13] in which there is establish the law according to which the owner of the land shall also become the owner of the building. The same ancient Roman rules will be applied in the case of the unification of two immovables[14].

The accession whose object deals with two movables is regulated in a very strange manner by the Code of Calimach, which will later be included in the content of the Romanian Civil Code that entered into force in 2011. According to this pattern, if any one has been working with another's materials and will mix his own materials with the other one's, he will not acquire the ownership over those things because, then when those things would be brought back to their initial status, each owner will regain his own thing or, the owners of those things will share them as co-owners, on the condition that the one whose things have been joined be retained or left to the other person. By an attentive analysis of these dispositions, one can easily notice that unlike the norms of the Roman private law which established different juridical situations[15], the same regime is supposed to be applied to more juridical institutions. This error is due to the fact that the Roman juridical texts considered them to be natural modalities for acquiring the ownership[16], while the members of the commission that drafted the dispositions of the Calimach Code erroneously considered that accession, mixture and specification will be submitted to the same juridical regime. These are the reasons why the fourth chapter of the Section concerning the real rights of the Calimach Code was entitled „Obtaining the ownership over properties through increase or addition" and title XXVI th of

[12] See the provisions of paragraph 2 title XXVI according to which „if someone will build a house on another's land, or build in the underground without any previous convention with the owner of the land, or will build something over another's building, then the owner of the land will become the owner of the built things."

[13] In agreement with art 562 of the Calimach Code „if someone will willingly build with another's materials on his own land, then the building will remain his as mentioned in the rule: the building is submitted to the land it has been built on." In agreement with art 563 of the Calimach Code: „on the contrary, if someone with his own materials built something on another's land, then that building will be due to the proprietor of the land, in conformity with the following law: the buildings are subject to the place they have been built on."

[14] Pragraph 1 of title XXVI-th of the Andronache Donici's "Juridical Manual"; art. 551 and 552 of the Calimach Code - Constantin Hamangiu, *Codul general al României. Volumul I. Codurile* (Bucureşti: Editura Librăriei Leon Alcalay), 1907.

[15] Valerius M. Ciucă, *Lecţii de drept roman*, volumul I (Iaşi: Editura Polirom, 1999), 270.

[16] „The natural reason is also resorted to in other cases. On a change of species, also, we have recourse to natural law to determine the proprietor. Thus, if grapes, or olives, or sheaves of corn, belonging to me, are converted by another into wine, or oil, or (threshed out) corn, a question arises whether the property in the corn, wine, or oil, is in me, or in the author of the conversion; so too if my gold or silver is manufactured into a vessel, or a ship, chest, or chair is constructed from my timber, or my wool is made into clothing, or my wine and honey are made into mead, or my drugs into a plaster or eye-salve, it becomes a question whether the ownership of the new product is vested in me or in the manufacturer. According to some, the material or substance is the criterion; that is to say, the owner of the material is to be deemed the owner of the product; and this was the doctrine which commended itself to Sabinus and Cassius; according to others the ownership of the product is in the manufacturer, and this was the doctrine favoured by the opposite school." - *Gai Institutiones* II. 79.

„When a man makes a new object out of materials belonging to another, the question usually arises, to which of them, by natural reason, does this new object belong – to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver, or bronze; or mead of his wine and honey; or a plaster or eyesalve out of his drugs; or cloth out of his wool; or a ship, a chest, or a chair out of his timber. After many controversies between the Sabinians and Proculians, the law has now been settled as follows, in accordance with the view of those who followed a middle course between the opinions of the two schools. If the new object can be reduced to the materials out of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material – bronze, silver, or gold – of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey out of which it was compounded." - *Iustiniani Institutiones* 2. 1. 25.).

the "Juridical Manual" of Andronache Donici was entitled "On whatever is acquired beyond a natural equitableness."

Another novelty brought by this regulation is that of specification, in the chapter about accession. At a closer analysis one can notice that these dispositions are originated in the Institutions of Justinian which adopt an extra solution to the one suggested by Gaius - a jurisconsult devoted to the old patrician traditions - who promoted the idea that the newly obtained things belongs to the owner of the material. Since the social conflicts appear at the level of the juridical regulations, inclusively, the Justinian theory was taken over by the ancient Romanian law referring to specification[17], although the solution adopted by the members of the commission drafting the Calimach Code established the fact that the artisan will acquire the ownership over the material used in order to obtain a certain property[18].

III. Accession in the Ancient Romanian Civil Code

The three hypotheses of accession are also met with in the provisions of the ancient Romanian Civil Code. If, in the case of the natural accession to immovables, the ancient Roman conception was taken over completely, the substance of the artificial accession to immovables includes, for the first time, provisions regarding the possibility of the landowner to oblige the person who had built on his land to pull the building down[19]; this fact enables the builder to recuperate the ownership of the building materials, because, as long as the union exists, the right over the accessory thing is frozen. This situation is far from being accidental, as the law-maker adopts similar rules with regard to the accession to movable property as well, rules that allow the owner of these things to require the separation and the restitution, in case they are more valuable than the principal property[20]. Under these conditions, a serious violation from the finality in view was noticed, although the Romanian law-maker of 1864 established the criteria meant to make a distinction between the principal thing and the accessory one, according to the French model. Therefore, in conformity with art 567 and 569 of the French Civil Code of 1804 - whose content has been taken over by the Romanian law-maker[21] - it is considered to be principal that thing for whose usage, ornament or completion the unification with the other thing whose value is higher was necessary[22]. Nobody denies the usefulness of these regulations, but can we still speak about accession in case its thing is more valuable than the principal one, and consequently, its owner can claim it?

Analyzing the way the laws were adopted at the beginning of the XIX th century, the ancient Civil Code of 1864 erroneously[23] considered specification close to accession; in this way the concept referring to value plays an important role as, contrary to the Roman juridical texts, the artisan will

[17] According to paragraph 5 of title XXVI of the Juridical Manual of Andronache Donici „when another's materials enter the composition of a thing[...] which cannot be separated without spoiling the material, then after paying for the materials, they remain to the owner of the land; yet, if the materials can be restored to their initial state, then the effort vanishes [...]".

[18] Art. 561.

[19] According to the provisions of art 494 paragraph. 1 of the Ancient Romanian Civil Code, if the buildings and the works have been made by a third person with his own materials, the landowner has the right to keep them or to oblige that person to take them away."

[20] Art. 506 of the Ancient Romanian Civil Code.

[21] Art. 505, 507.

[22] According to the provisions stipulated by art 507 of the Ancient Romanian Civil Code, if out of the two things united as to form one single thing none of them can be considered an accessory to the other one, it is considered as principal the one having a higher value. In case the value of the things is almost equal, the one whose volume is bigger will be considered the principal.

[23] Contrary to the French and Roman law-makers the Italian law-maker of 1942 mentions the specification alongside with other different modalities of acquiring the ownership.

acquire the ownership over a newly created thing then when the manual labour would greatly exceed the value of the used materials, even if that thing can or cannot resume its initial state[24]. So, beginning with this period we are the witnesses of a new wave of thinking in the domain of the ownership, thinking that will extend greatly in 2011, the year of the implementation of the New Romanian Civil Code.

IV. Accession in the New Romanian Civil Code

The entering into force of the New Romanian Civil Code of 2011 stands for the materialization of the practices introduced by the Romanian law-maker in 1864. It is a certain fact that the effects of this policy will be also noticed in the domains of accession to immovable, adjunction and specification as mentioned by the provisions of the section devoted to the accession to movable.[25]

The new provisions concerning the artificial accession to immovable are definitely diverting from the ancient Roman regulations, as - by the provisions of art 581 and 584 of the Civil Code - they offer the possibility to the author of the work - irrespective of his good or bad faith - to buy the construction - at the request of the owner - at the price it could have if the construction had not been built. This situation is mentioned in a around about way by the provisions of art 584 paragraph 3 of the New Civil Code[26] that establishes the juridical regime of the useful adjunct work. It goes without saying that similar provisions will be applied in the case of autonomous works regulated by the provisions of art 581[27] and 582[28] of the New Civil Code; both laws stipulate similar provisions. This time, as usual, the economic reasons are considered more important that the final aim the juridical institution of accession had in view.

Moreover, it is not clear why the bad-faith author can derive profits from buying an immovable property at the market price it might have had if that construction had not been built.

The provisions referring to the accession to movable visibly estrange from the provisions of the Ancient Romanian Civil Code and from the norms of the Roman private law because, in case of the adjunction of two movable things, their owners can ask for their separation if by the separation

[24] Art.508, 509 of the Ancient Romanian Civil Code; art 940 of the Italian Civil Code of 1942.

[25] Book III (On Goods), title II (Private Property), chapter II (Accession), section IV of the New Romanian Civil Code.

[26] Irrespective of the good or bad faith of the author of the work, if its value is high, the ownership of the real property can oblige the author to buy it at the price the immovable would have been estimated at if the construction had not been done.

[27] „When the author of the autonomous work, having a lasting character over the immovable of someone else, is of good faith, the owner of the real property has the right to:

a) ask the court to register him in the land register as the proprietor of the work, if paying, according to his choice, the value of the materials and of the manual labour to the author of the work or the extra value added to the construction by improving it;

b) to ask the court to oblige him to buy the immovable at the price it might have had if the work had not been done."

[28] „(1) When the author of the autonomous work having a lasting character over the immovable of someone else is of bad faith, the owner of the immovable has the right to:

a) ask the court to register him in the land register as the proprietor of the work if paying, the author of the work according to his choice, half of the value of the materials and of the manual labour or of the extra value added to the construction;

b) to ask to court to oblige the author of the work to pull the construction down;

c) to ask the court to oblige the author of the work to buy the immovable at the price might have had if the work had not been done.

(2) The demolition of the work is done with observing the legal provisions in the domain, on the expense of its author who is at the same time obliged to repair all damages which also include the fact that the construction has not been used."

the prejudice suffered by the other proprietor could be bigger than a tenth of the value of his own property. On the other side, in case this is not possible, the Romanian law-maker applies the rules from the domain of specification, according to which, depending on the value of the labour work or of the materials, the property will belong to the artisan or to the owner of the materials.

After a deep analysis of these provisions, one can notice that in the virtue of an old Roman mentality, accession will operate in favour of the owner of the more valuable thing (a trader) or of the one who produced it (the artisan).

V. Conclusions

Society is the place where the interests of different social categories come into conflict, and the results of this conflict are more often than not reflected into the content of the juridical norms which represent the interests of the dominant class. The same conclusion is reached when analyzing the modality of how the juridical institution of accession developed. We do neither reprove the present material conditions that determine certain juridical regulations nor the usefulness of these regulations, because various social categories are interested to impose their own interests as juridical norms. Unfortunately, on this occasion, the representatives of these categories want the standardization of certain juridical aspects as to be able to find new juridical procedures meant to satisfy their own interests, even if they evidently depart from the real functions of accession. Given these realities, for maintaining the equilibrium between the law principles and the juridical institutions it is necessary the redefinition of the criteria according to which the property can be principal or accessory and it is useful to create new juridical institutions able to allow a harmonious inclusion of the new procedures of the juridical system.

References

- Aurel N. Popescu, trans., *Gai Institutiones* (Bucureşti: Editura Academiei RSR, 1980), 141-142.
- Vladimir Hanga, trans., *Iustiniani Institutiones* (Bucureşti: Editura Lumina Lex, 2002), 64-74.
- Ioan Nădejde şi Amelia Nădejde Gesticone, *Dicţionar latin-român complect pentru licee, seminarii şi universităţi* (Iaşi: Editura „Viaţa Romînească", 1927), 6.
- C. Accarias, *Précis de droit romain*, tome premier (Paris: Librairie Cotillion, 1891), 634.
- Constantin St. Tomulescu, *Drept privat roman* (Bucureşti: Tipografia Universităţii, 1973), 185.
- C. Cătuneanu, *Curs elementar de drept roman* (Cluj-Bucureşti: Editura „Cartea Românească", 1927), 246.
- Paul Frederic Girard, *Manuel élémentaire de droit romain* (Paris: Librairie Arthur Rousseau, 1924), 342.
- Andrei Rădulescu et al., *Îndreptarea legii* (Bucureşti: Editura Academiei, 1962), 290.
- Valerius M. Ciucă, *Lecţii de drept roman*, volumul I (Iaşi: Editura Polirom, 1999), 270.
- Constantin Hamangiu, *Codul general al României. Volumul I. Codurile* (Bucureşti: Editura Librăriei Leon Alcalay), 1907.

UNDER THE NEW CIVIL CODE: THE SALE CONTRACT IS TRANSLATED PROPERTY OR CREATOR ONLY OF OBLIGATIONS?

Liviu STĂNCIULESCU[*]

Abstract

According to art. 1650, paragraph. 1, of the Civil Code, "The sale is the contract that the seller transmits or, where appropriate, seek to transmit the property of an asset to the buyer, for a price which the buyer is obliged to pay" The dispositions of the 2011 civil code suggests that compared to the time of transfer of ownership, the contract may have different legal nature: creative translative property or obligations. Thus, transfer of ownership may be immediately and in this case, as occurs or may be postponed (conclusion of the contract) and in this case, is an obligation of the seller. For example, art. 1674 of Civil Code states that "the property is" shifting "by right to the buyer" and "General Provisions" of art. 1672. paragraph 1 and art. 1673. paragraph 1 of Civil Code provides that "The seller is obliged to transmit the buyer the ownership of the sold property ". Please note that until the appearance of the Civil Code 2011, the sale was widely known as "translational property" and a possible shift in the category of contracts creating obligations would produce important consequences for the concept (and related institutions). On the background issues above, we consider that the presentation of opinions and arguments in their support could be beneficial.

Keywords: *seller, property transfers, ownership, obligations, contract*

a) Transfer of ownership: the right or the responsibility of the seller?

The sale (that any legal act) legal effect, designed to enforce their interests. As derived directly from the contract (of law) or to the parties, the effects of the contract is divided into: effects of legal and personal effects. Thus, the sales contract has a double effect: the transfer of ownership from the seller to the buyer and the creation of obligations (to the parties).

Given the text of the law, that "the seller shall provide or, where appropriate, the buyer is obliged to send a good property" (Art. 1650 para. 1 Civil Code) would seem that the legislature in 2011 is only concerned with time transfer of ownership.

Without diminishing the role of time in which ownership is transferred from seller to buyer, at least as important to consider and determine the real spring that goes right to the buyer.

Clarification inconsistency is justified by the New Civil Code provisions. Thus, according to art. Paragraph 1650. A Civil Code, "the seller send" or seller "is obliged to submit property" (a transfer of ownership means that person is a seller's obligation), in turn, according to art. 1674 Civil Code, "property is shifting the right buyer at the time of conclusion" and art. Paragraph 1683. 3 Civil Code, "property is shifting the right buyer at the time of acquiring the property by the seller" (transfer of ownership is done right, the effect of the agreement will, even when the seller becomes the owner after the contract).

Next, we present briefly the transfer of ownership characteristics in the contract of sale, both in terms of mechanisms that produce it, but the implications when it is done.

[*] Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (e-mail: stanciulescu.liviu@gmail.com)

b) Property transfers: legal (automatic, instant abstract)

Translative property contracts, representative doctrine is unanimous in assessing that the transfer of ownership takes the law (by agreement of wills, the contract itself, the source of the transfer).

Thus, in the opinion permitted national appreciated that, "In contracts which have as their object or another translation as real property, property or right is transmitted by operation of contract" (sn), thus the transmission of ownership is achieved "automatically and ex law.[1]"

Likewise, "even if the parties by their will postpone the transfer of ownership to a date other than the conclusion of this transfer will be all automatic" (sn)[2].

In the same context, but in another opinion stated that "the sale is in essence a contract translative of property so sold property transfer is done right, by contract[3].

Consequently, the seller has an obligation to transfer the property because, once the property transfer contract law, without the intervention of the parties[4].

Transfer of ownership occurs as, although it was agreed that when the transfer is delayed (Art. 1683 para. 3 Civil Code). In short the difference between the transfer of property and obligations of the parties is the difference between the obligations of giving and doing[5].

Also indicated that the transfer of ownership is made instantly (totally healthy), that is inconceivable to understand a possible "transfer rate" of ownership[6].

We appreciate that misunderstandings New Civil Code, reported the matter of ownership transfer mechanism should be attributed to different situations and without coordination of these laws.

Opinion that in any case, there is no question about a contract of sale otherwise (than already known) and therefore, according to the concept enshrined in national and European doctrine, the transfer of ownership in the contract of sale always operates of law (whether time coincides with the conclusion of the contract or transfer was postponed by the will of the parties or the law)[7].

In conclusion, the "displacement" effect property is a legal contract and the seller has two obligations (personal) main teaching work and guarantee customer.

c) When transferring ownership.

In terms of his conduct in time when transfer of ownership is important (to be defined and in no way confused with the source, spring transfer law).

Transfer of ownership at the time the contract.

---

[1] See L. Pop, Talk about some clarification of their obligations covered by the law no. 8 / 2005, p. 56-57.

[2] "The sale gives rise only to the requirements of teaching work sold, which is but one to make, and not one to give, subsequent transfer of ownership", see D. Chirica, special contracts. Civile and commercial Rosetti House, Bucharest, 2005, p. 74-75.

[3] See F.l. Moțiu, Special Contracts, Legal Universe Publishing, Bucharest, 2011, p. 59.

[4] The European doctrine established, the value that transfer work widely sold is not "an obligation lies with the seller, because it is done by simple effect of the contract, that is, abstract manner, without any formality and, in principle, instantly" (sn), see Ph. Malaurie, L. Aynès, P.Y. Gautier, Droit civil. Les contrats speciaux, Defrenois, Paris, 2007, p. 161, J. Huet, Traité de droit civil. Les principaux contrats spéciaux, LGDJ, Paris, 2001, p. 179; A. Benabent, Droit civil, civils et Les contrats speciaux comerciaux, Montchrestien, Paris, 2008, p. 94.

[5] See G. Boroi, A.C. Anghelescu, civil law course. The general part. Hamangiu Publishing, Bucharest, 2011, p. 156.

[6] See D. Chirica, op. cit. (2005), p. 40.

[7] Given that ownership is an abstract, we ask the question: How should the legislature understand the actual transfer of ownership by the direct seller?

Usually, the transfer is done right at the time of conclusion of sale. It says so on the immediate transfer of ownership. According to art. 1674 Civil Code, "property is shifting the right buyer at the time of conclusion, even if the property was not delivered or was not yet paid the price."

Postponing the transfer of ownership after the contract end sale at a later date can be operated with the law.

Likewise, time delay and the parties may transfer agreement at a later date will. They have the right to postpone the moment of transfer of ownership because "time is not of public order"[8].

If the sale of future goods, transfer of ownership operates only when they were executed (if things are to be made, the next crop, etc.).

Also, "when the sale is to such goods, including goods from a limited kind, the property is transferred by the buyer on their individualized teaching, counting, singing, printing, measurement or by otherwise agreed or required by the nature property "(Article 1678 Civil Code).

When concluding the contract the Seller is not working, own health is shifting the right buyer at the time of acquiring the property by the seller (Art. 1683 para. 3 Civil Code).

Likewise, the sale in installments, "the buyer acquires ownership of the final installment payment on the price," even if the thing was delivered terminates the contract (art. 1684 and art. 1755 Civil Code). In this case, the automatic transfer of ownership and abstract character remains[9].

According to art. 119 of Law no. 71/2011 formalities necessary for enforceability reserve property advertising applies to contracts concluded before the entry into force of the New Civil Code, "if the subject property did not become enforceable against the previous law."

Finally, by the will of the law, "real rights on buildings included in the land is acquired, both between parties and against third parties" only upon entry in the land (Article 885 Civil Code). Thus, the sale agreement marks the only time of registration of transfer of immovable property (not the transfer itself, which takes place by agreement of wills).

In conclusion, according to the New Civil Code, the sale of property, transfer of ownership from the seller when the buyer is after the conclusion of the contract and the time overlaps effective against third parties.

d) Another thing selling is prohibited or valid?

By its nature, the sale is "translational property" because the work transferred ownership from seller to buyer. So to achieve the transfer of ownership, the seller must hold the right alienated[10].

Per a contrario, if the seller does not own, cannot sell (on the principle that gave Quod nemo non habet). Thus, "Nothing seems more obvious and common sense than the fact that nobody can send more rights than he himself"[11] (sn).

Based on the foregoing, ownership of the seller is a requirement for the validity object. Although legal abnormal operation, sale by a non-proprietary work is common in practice is known as "selling another thing." The most common are cases of fraudulent operations (eg a third party sale or sales work the same good to multiple buyers), the work sold to a third party without bad faith (in the hope that it will acquire and transmit property later in time[12]) or retroactive loss of the right (following the cancellation or acquisition of property resolution act).

[8] In the French doctrine speaks of bringing forward the time of transfer of ownership of property to be purchased later, see A. Benabent, civil Drpoit. Les contrats speciaux civils et commerciaux, Montchrestien, Paris, 2008, p. 95-97.

[9] See D. Mainguy, Contrats speciaux, Dalloz, Paris 2008, p. 123.

[10] See Fr. Deak, civil law treaty. Special contracts, Actami Publishing, Bucharest, 1999, p 56.

[11] See D. Chrică, op. cit. (2005), p. 71 ff.

[12] For example, the sale by one spouse without the consent of a common good spouse or a spouse possessing, selling to a co-owner of an undivided ownership so good.

In our legislation, the sale is not expressly banned another work and therefore the situation is subject to general principles governing conventions (general theory of contract)[13].

Please note that previous national doctrine, under the empire of the Civil Code of 1864 acknowledged that "the sale of another work" void contract (for non-requirement of validity of the object).

The new Civil Code challenged "sale of another work" by the provisions of art. paragraph 1683. One that "if the conclusion of the contract on an individual item determined, it is owned by a third party, the contract is valid" (sn).

In these new conditions, requiring a reconsideration of the institution "another sale work", for which thus arises a natural question: sale of another work or not valid?

From the outset we must stress that we appreciate the provisions of art. 1683 of the New Civil Code, at least for the fact that they have reopened the issue of sale of another work (properly unresolved previous regulations).

Please note that the doctrine of recent French ban on the sale is estimated that another work is fully justified in the case and immediately transfer the property. Otherwise, the parties postponed the transfer of ownership to a later conclusion of the sale, "prohibition loses its opportunity.[14]"

In agreement with the current design, we consider that the seller should not always ownership at the time the contract. It is sufficient that the requirement of ownership to be fulfilled at the time of transfer to the buyer the right (which can be time the contract or a later time set by law or will of the parties - art. 1674 Civil Code). For this reason, the sale of future goods, the sale of such goods, the sale on time, etc., could not pronounce the nullity of contracts.

Trying to answer the question above, we must distinguish between two situations, as: the property buyer is shifting (right) with the contract or transfer of ownership is postponed. In the first case, the transfer of ownership takes place in time the contract if the seller has no ownership, contract of sale is sanctioned by nullity (for non sold work requirement).

Given the above, the sanction applicable to differ, as the parties were in error or have been informed (about the ownership of the seller).

When the parties (or at least the buyer) were in error, believing that the property belongs to the seller sold[15] it was accepted that the sale is canceled (relative void) for error on the essential quality of the seller (owner of the work considered sold). In this situation, we can say that the seller apparently acted as an owner.

Relative nullity of the sale may be made only by the purchaser, by the action (if the price was paid) or an exception (if the price was not paid).

The seller cannot rescind the contract under any circumstances, even if in good faith, because the error does not make void the falls on the person with whom contracted[16].

No real owner can request cancellation, the third to the contract, but may bring an action to recover possession[17]. In this case, non-exercise claim action can be interpreted as "ratification of sale by owner" (Art. 1682 para. 2 Civil Code).

---

[13] Unlike French law, in that art. 1599 Civil Code provides that sales other work is zero.

[14] This is the reason why French law tends to limit the scope of nullity domenuiul established by art. 1599 French Civil Code, see F. Collart Dutilleul, Ph. Delebeque, Contrats civils et commerciaux, Dalloz, Paris 2001, p. 117-119.

[15] See R. Sanilevici, I. Macovei consequences sale solutions work in the light of other legal practice in DRR no. 2 / 1975, p. 33 and practice: C.S.J., v. Civil Code, in December. no. 132/1994, the Law no. 5 / 1995, p. 77.

[16] According to art. 1212 Civil Code, "The victim of an error which is not otherwise entitled to the requirements of good faith."

[17] See T.S., v. Civil Code, in December. no. 2257/1967, in C.D. 1967, p. 83.

But if, meanwhile, became the owner seller work (after the sale), no buyer cannot rescind it.The obligation to guarantee the seller for eviction and remain in a situation where the buyer has not requested or required prior to cancellation, is the true owner crowded.

Note that, if the property is alienated in the public domain of the state or territorial administrative units, the contract is absolutely null in all cases, even if the buyer was in good faith (art. 136 of the Constitution).

When the parties knowingly entered into the contract (there was bad faith), knowing that the thing sold is the property of another person (and therefore the error is no longer an issue), it was considered that the sale transaction is a purchase of another speculative work, that is absolutely illegal and therefore null (under art. 1236 par. 2 and art. 1238 par. 2 Civil Code)[18].

Note that, since the absolute nullity may be invoked by any person in this situation, the true owner may invoke the nullity, even if not attended the conclusion of the Convention. Over all the above, do not forget that according to the spirit of the Civil Code the legal act is presumed to be valid and the invalid is an extreme sanction, which operates only when the legal act cannot be preserved in any way.

In the second case, the transfer of ownership (and work) is postponed to a time after the conclusion of the contract if the seller has not become the owner of the work, the contract of sale is sanctioned by rescinded (for failure to obtain work and to "ensure "thus, transfer of ownership to the buyer - art. 1683 par. 4 Civil Code).

Appreciated that the new vision of the Civil Code in this field, enter the direction of European doctrine. For example, the recent French doctrine, selling work of another, is considered restrictive, appreciating that "there selling work to another, shall, be exposed to the crowed buyer made a true owner who exercises the claim" (sn). To do this, "should result in a sale of property right transfer, opening and a true owner's claim"[19].

Moreover, all the French doctrine is admitted that the sale of another work "cannot be canceled when the seller, even if no owner of the work, is its apparent owner, as if the heir apparent" (sn). In this case, "the sale is valid on two conditions: good-faith purchaser (he ignores the fact that the seller was not the owner) and common error (everyone thought so): error facit jus communis (common error is the source of law) [20]".

Consequently, under the new Civil Code requirement seller of property owner has suffered an attenuation conditional for delay transfer of the right (by the will of the parties or the law). In this case, it is accepted that, and can contract valid conclusion by a non-proprietary vendor.

Can be thus concluded by a non-proprietary valid sale and future assets, such sales, sales of individual assets determined (acquisition condition subsequent work), etc.

References

- G. Boroi, A.C. Anghelescu, civil law course. The general part. Hamangiu Publishing, Bucharest, 2011
- D. Chirica, special contracts. Civil and commercial Rosetti House, Bucharest, 2005
- Fr. Deak, civil law treaty. Special contracts, Actami Publishing, Bucharest, 1999

[18] The contract vendor fraud law by owner, with the complicity and in any case, the risk of the purchaser, is a typical case and void, see Fr. Deak, op. cit., p. 42 and practice: Tribe. Constanta County, v. Civil Code, in December. no. 778/1987, in R.R.D. no. 2 / 1988, p. 69 70.

[19] To do this, "should result in a sale of property right transfer, opening and a true owner's claim" see Ph. Malaurie, L. Aynes, PY. Gautier, civil law. Special contracts, Wolters Kluver, Bucharest, 2007, 124.

[20] See Ph. Malaurie, L. Aynes, PY. Gautier, op. cit., p. 126-127.

- Fl. Moțiu, special contracts, Legal Universe Publishing, Bucharest, 2011
- L. Pop, talk about some clarification of their obligations covered by the law no. 8 / 2005
- Sanilevici R., I. Macovei consequences sale solutions work in the light of other legal practice in DRR no. 2 / 1975, and practice: C.S.J., v. Civil Code, in December. no. 132/1994, the Law no. 5/1995, T.S., v. Civil Code, in December. no. 2257/1967, in C.D. 1967, p. 83.
- A.Benabent, Droit civil, civils et Les contrats speciaux comerciaux, Montchrestien, Paris, 2008
- F. Collart Dutilleul, Ph. Delebeque, Contrats civils et commerciaux, Dalloz, Paris, 2001
- J. Huet, Traité de droit civil. Les principaux contrats spéciaux, LGDJ, Paris, 2000
- Ph. Malaurie, L. Aynès, P.Y. Gautier, Droit civil. Les contrats speciaux, Defrenois, Paris, 2007
- D. Mainguy, Contrats speciaux, Dalloz, Paris, 2008

THE EUROPEAN MECHANISM FOR FINANCIAL STABILITY AND THE EURO-PLUS PACT

Augustin FUEREA[1]

Abstract

The economic crisis that has affected countries from all continents has generated, among others, also a strong financial crisis, which in turn, has caused serious imbalances in the economic and financial environment of EU Member States. Under these circumstances, the Council, being in an exceptional situation, "outside the control of Member States", as it itself states in the Preamble to Regulation No. 407/2010, considered necessary, "the immediate establishment of a stabilization mechanism at EU level in order to maintain the financial stability in the European Union", mechanism that "would enable the Union to respond in a coordinated, rapid and effective way to the serious difficulties undergone by a certain Member State".

Keywords.*The European Financial Stabilization Mechanism; the Euro-Plus Pact; European Union; The Council Conclusions; EU Member States.*

Introduction

Without claiming to develop a specialized analysis on the financial crisis that not just Europe has crossed through the last three years and still crosses, it is impossible not to observe the concerted efforts of Member States of the European Union in order to overcome it, or, at least, to maintain it at the same level. Thus, further on, we propose an overview of what is happening now in the EU, while trying an economic recovery in Europe. This presentation is however limited only to the legal aspects, leaving time to decide whether all these efforts have been successful or not. In this sense, we bring in the forefront two measures at EU level, namely the European Financial Stabilization Mechanism and the Euro-Plus Pact.

2. The European Financial Stabilization Mechanism (EFSM)

The economic crisis that has affected countries from all continents has generated, among others, also a strong financial crisis, which in turn, has caused serious imbalances in the economic and financial environment of EU Member States.

Aware of the fact that it witnesses a financial crisis and an economic downturn "without precedent which has brought serious damage to the economic growth and financial stability, leading to a strong deterioration in the deficit and debt situation of Member States"[2], the European Union legislature has been put in the situation of facing new challenges. One of these challenges is the fact that the financial crisis has also deteriorated the loan conditions in Member States, situation which, unregulated in time would result in the emergence of a new threat "against the stability, unity and integrity of the Eurozone, as a whole"[3].

---

[1] Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (email:augustinfuerea@yahoo.com).

[2] Paragraph (3) of the Preamble to Regulation No. 407/2010 of the Council of May 11, 2010 establishing a European mechanism of financial stabilization.

[3] Paragraph (4) of the Preamble to Regulation No. 407/2010.

Under these circumstances, the Council, being in an exceptional situation, "outside the control of Member States"[4], as it itself states in the Preamble to Regulation No. 407/2010, considered necessary, "the immediate establishment of a stabilization mechanism at EU level in order to maintain the financial stability in the European Union"[5], mechanism that "would enable the Union to respond in a coordinated, rapid and effective way to the serious difficulties undergone by a certain Member State"[6]. The mechanism is activated in the context of a joint support EU / International Monetary Fund (IMF). Therefore, on May 13, 1010, Regulation no. 407/2010 for establishing a European financial stabilization mechanism[7] came into force; through this regulation, "strict economic policy conditions to maintain the sustainability of public finances of the beneficiary Member State and to rebuild its capacity to finance itself on financial markets"[8] were imposed.

The mechanism established by Regulation no. 407/2010 reproduces, in the 27 EU Member States, the basic principles of operation of Regulation no. 332/2002 for establishing a facility providing medium-term financial assistance for Member States balances of payments, applicable to Member States outside the Eurozone.

The rules contained in the Regulation determine the conditions and the procedure under which a Member State that is affected or is in a situation that ultimately leads to severe economic or financial distortions may obtain financial assistance from the Union. We mention that the situation where that State is in must be caused by exceptional occurrences resulted beyond its control.

If a Member State wishes to obtain financial assistance from the Union, pursuant to Regulation no. 407/2010, it shall notify the Commission institution of its intention, presenting also a draft program of economic and financial adjustment. Discussions are being held with the European Commission, in cooperation with the European Central Bank (ECB). The financial assistance which may take the form of a loan or a credit line is granted by a Council decision adopted by qualified majority, based on a proposal from the Commission.

Under article 3, paragraph (3), letters a), b) and c), the decision to grant a loan include the following:

- the amount, the average maturity, the pricing formula, the maximum number of instalments and the period of availability of the financial assistance from the Union, as well as other rules necessary for the implementation of the assistance;

- general economic policy conditions attached to the financial assistance from the Union in order to restore a sound financial or economic situation in the beneficiary Member State and to rebuild its capacity to finance itself on financial markets; these conditions will be determined by the Commission, in consultation with the ECB;

- an approval of the adjustment program prepared by the beneficiary Member State in order to fulfil the economic conditions attached to the financial assistance received from the Union.

Regarding the decision to grant a credit line, article 3, paragraph (4), letters a), b) and c) sets out its content, namely:

- the amount, the fee for the credit line availability, the pricing formula applicable for the release of funds and the period of availability of the financial assistance from the Union, as well as other rules necessary for the implementation of the assistance;

---

[4] Paragraph (5).
[5] Idem.
[6] Idem.
[7] This Regulation shall not affect the validity of Regulation No. 332/2002 establishing a facility providing medium-term financial assistance for Member States balances of payments.
[8] Paragraph (7) of Regulation No. 407/2010.

- general economic policy conditions attached to the financial assistance from the Union to restore a sound financial or economic situation in the beneficiary Member State; these conditions will be established by the Commission, in consultation with the ECB;

- an approval of the adjustment program prepared by the beneficiary Member State in order to fulfil the economic conditions attached to the financial assistance received from the Union.

"When the mechanism is activated, it allows the Commission to loan from financial markets on behalf of the Union, under cover of an implied warranty from the EU budget. The Commission loans then the receiving funds, to the beneficiary Member State. This special credit arrangement involves the absence of charges afferent to the debt service for the Union. The interest and the loan capital are fully reimbursed by the beneficiary Member State, through the Commission. The EU budget guarantees the redemption of bonds by a p.m. line, in the event of default by the debtor"[9].

In addition to this mechanism, the European Facility for financial stability[10], such funds guaranteed by the Euro area, as well as IMF funding are available for Member States of the Eurozone. If a Member State wants funding from the International Monetary Fund, the State must first notify the European Commission. Following the notification, the Commission shall examine the possibilities within the mechanism of financial assistance from the Union, as well as the compatibility conditions on economic policy for commitments envisaged by the Member State to implement the recommendations of the Council and the decisions of the Council adopted under articles of the Treaty on the functioning of the European Union[11].

Member States outside the Eurozone are also eligible for assistance under the Regulation on the balance of payments.

According to The Communication of the European Commission on the European financial stabilization mechanism[12], "on November 21st, Ireland requested financial assistance from the European Union and Member States of the Eurozone. In the context of a joint program EU / IMF, the financial assistance package for Ireland will be funded through the EFSM and FESF, supplemented by bilateral loans to be negotiated by Member States". According to the same document, "in 2010, most Member States of the Eurozone registered large public deficits, which resulted in substantial increases of total issuances of government bonds denominated in Euro and in further growth of public debt. That overall increase in the offer of sovereign bonds increased the difficulties in accessing the market for some smaller issuers, which also involved the persistence of a future refinancing risk. Amounts to be attracted from the market in 2011 are, generally the same as in 2010 and will remain at least as high for many years"[13].

3. The Euro-Plus Pact

The European Council from March[14] this year took place on the background of a sensitive economic recovery in the global economic crisis. Heads of State or Government, meeting in Brussels, adopted, among other things, a package of measures designed to help overcome the financial crisis. The package aims at strengthening the economic governance of the European Union and at ensuring the sustainability of the Eurozone, as a whole.

[9] According to the Commission Communication to the Council and to the Economic and Financial Committee on European financial stabilization mechanism, COM (2010) 713 final of November 30, 2010, p. 2.

[10] FESF.

[11] Articles 121, 126 and 136 TFEU.

[12] COM (2010) 713 final, p. 6.

[13] Idem.

[14] 24 to 25 March 2011, Brussels. The Council Conclusions are also found on the website of the European Council: (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/RO/ec/120300.pdf).

In Annex I of the Conclusions presented at the end of the meeting from March, we find details about the Euro-Plus Pact[15]. The Pact is nothing else but an agreement concluded between Member States of the Eurozone and was joined by Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania. Besides these countries, others are also invited, but voluntarily.

The purpose of the Pact, as agreed by Heads of State or Government is the strengthening of the "economic pillar of monetary union in order to achieve a new quality of economic policy coordination, to enhance competitiveness, leading thus, to greater convergence"[16]. The Pact focuses mainly on areas of national competence and which are essential for enhancing competitiveness and preventing further disturbances.

The Pact is based on ***four guiding rules***, as it follows:

1. The Pact will be *conform to the existing economic governance* within the Union and will strengthen it. At the same time, the Pact is conducted using tools already available, namely: Europe 2020, the European Semester, the Integrated Guidelines, the Stability and Growth Pact and the new framework for macroeconomic surveillance;

2. The Pact will cover *priority policy areas essential for promoting competitiveness and convergence*. In the policy areas chosen, the Heads of State or Government will agree on some common objectives[17];

3. *"Participating Member States will pursue these objectives through their own policy mix, taking into account the specific challenges faced*. Every year, each Head of State or Government will take concrete national commitments;

4. *The Pact will fully respect the integrity of the single market"*[18].

The Pact objectives can be achieved only if the participating States are able to fulfil their obligations, namely: promoting competitiveness, employment, strengthening the public finance sustainability and strengthening the financial stability. Each participating Member State must present specific measures that it considers necessary and that must adopt in order to meet these obligations. If a Member State can prove that it is not necessary to act in one area, it will not take measures in this direction. Each State is free to identify and establish by itself, nationally, measures to be adopted, but to the identification and promotion of national actions, the State participating to the Pact must take into consideration concrete policy and monitoring commitments provided in the Pact. Therefore, "choosing the strategic actions necessary to achieve the common goals is connected to the liability of each country, but special attention will be paid to possible measures being referred to further on"[19]:

A. Promoting competitiveness. Under the provisions of the Pact "the progress will be evaluated based on the evolution of wages and productivity and on the adjustment need, in the area of competitiveness. To assess whether wages evolve in accordance with productivity, unit labour costs (ULC) will be monitored over a period of time, in relation to developments from other Eurozone countries and comparable to the major trading partners. For each country, unit labour costs will be assessed in the economy, as a whole and separately for each major sector (manufacturing, services and the commercial and non commercial sectors). Significant and sustained growth can lead to erosion of competitiveness, particularly if it is accompanied by a growing current account deficit and by the diminishing of market shares for exports. Actions to increase competitiveness are needed in all countries, but special attention will be paid to those facing serious difficulties in this regard. To ensure balanced and widespread growth across the Eurozone, specific tools and joint initiatives will

[15] Annex I is entitled "Euro-Plus Pact - closer coordination of economic policy for competitiveness and convergence".

[16] Annex I to the European Council Conclusions, 24 to 25 March 2011, p. 13.

[17] Under the Pact, pp. 14-15.

[18] Idem.

[19] P. 15 of the European Council Conclusions, the document cited above.

be considered in order to promote productivity in regions lagging in development. Each country will be responsible for the specific policy actions that it chooses to take in order to promote competitiveness, but special attention will be paid to the following reforms:

(i) complying with national traditions of social dialogue and business relations, measures to ensure cost developments consistent with productivity, such as:

• reviewing procedures for determining wages and, where appropriate, the degree of centralization in the process of negotiation and mechanisms for indexing, while maintaining the autonomy of social partners in the process of collective negotiation;

• ensuring that the agreements establishing wages in the public sector support the competitiveness efforts from the private sector (taking into account the important barometer effect that wages from the public sector have).

(ii) measures to increase productivity, such as:

• further opening up of sectors protected by measures taken at national level to remove unnecessary restrictions on professional services and retail sector, to promote competitiveness and efficiency, by totally complying with the EU acquis;

• specific efforts to improve the educational systems and to promote research and development, innovation and infrastructure;

• measures to improve the business environment, especially SMEs, in particular by eliminating bureaucracy and improving the regulatory framework (for example, laws on bankruptcy, the commercial code)"[20].

B. Promoting employment. In this respect, it is stated that "a properly functioning labour market is essential for the Eurozone competitiveness. Progress will be assessed based on the following indicators: long-term unemployment rates and, among young people, employment rates. Each country will be responsible for the specific actions referring to policies that it chooses in order to promote employment, but particular attention will be paid to the following reforms:

• labour market reforms to promote "flexicurity", to reduce undeclared work and to increase employment;

• lifelong learning;

• tax reforms such as reducing taxes on labour, to increase work profitability, while maintaining the overall fiscal revenues and adopting measures to facilitate the labour force participation of the second contributor to the family income"[21].

C. Strengthening the public finances sustainability. "To ensure full implementation of the Stability and Growth Pact, special attention will be paid to:

- the sustainability of the pension systems, health care and social benefits.

This fact will be assessed, in particular, based on the sustainability gap indicators. These indicators show if debt levels are sustainable, based on current policies, especially on pensions systems, health care and social benefits and taking into account the demographic factors. Necessary reforms to ensure sustainability and adequacy of pensions and social benefits could include:

• aligning the pension systems to the national demographic situation, for example by aligning the effective retirement age to life expectancy or by increasing the participation rates;

• limiting early retirement schemes and using targeted incentives to employ older workers (especially the age group over 55 years).

- National fiscal rules. Participating Member States undertake to transpose the European fiscal rules, as set out in the Stability and Growth Pact, into national legislation. Member States will have the right to choose a specific national legal instrument to be used, but they will have to guarantee that

[20] The European Council Conclusions, the document cited above, pp. 16-17.
[21] Ibid, p. 17.

it is required and has a sustainable character (for example, by Constitution or by a framework Law). Also, the exact wording of the rule will be decided by each country (for example, it could take the form of a "debt brake", a primary balance related rule or of a norm of expenditure), but it should ensure fiscal discipline at national and sub-national level. The Commission will be able to be consulted on the tax legislation in question before adoption, with the total compliance with prerogatives of national Parliaments to make sure that it is compatible with EU rules and that it assists them[22].

D. Strengthening the financial stability. "A strong financial sector is the key-element to the global stability of the Eurozone. A comprehensive reform of the EU framework for financial sector supervision and regulation was developed. In this context, Member States undertake to adopt national legislation to solve the banking crisis, by fully complying with the Community acquis. Strict simulations of banking crisis, coordinated at EU level will be regularly done. In addition, ESRB President and the President of Eurogroup will regularly be invited to inform the Heads of State or Government on matters relating to macro-financial stability and macroeconomic developments in the Eurozone, requiring special attention. In particular, for each Member State, the private debt of banks, households and non-financial companies will be closely monitored"[23].

Once established the guidelines of the participating States' commitments, the action is transferred from the European Union, at States level. Consequently, the participating states gradually include in their national reform programs (NRP), as well as in the stability and convergence programs, a number of commitments covered by the regular supervisory framework, framework established by the Pact.

On June 21, 2011, the General Secretariat of the Council published the first document of Member States Ministers participating in the Euro-Plus Pact. Under the Report[24], "despite the short time interval between the agreement on the Euro-Plus Pact and the PNR transmission, and the stability and convergence programs, the majority of participating States have succeeded to provide measures in their programs in relation to commitments under the Euro-Plus Pact. In total, more than a hundred different measures, focusing in particular, on the four objectives of the Euro-Plus Pact were announced: competitiveness, promoting employment, strengthening public finance sustainability and strengthening the financial stability". Next, we shall present the commitments and national policy measures adopted in Romania, as they are listed in the Annex[25] to the Report.

1. Promoting competitiveness

- the declining share of GDP with wages in public sector by one percentage point in 2012 compared with 2010, through gradual recovery until the end of 2012 of nominal reductions with 25% made in 2010. Therefore, the development of the unit labour cost will be below the level of the labour productivity development;
- strengthening the capacity and performance of the research, development and innovation sector (RDI), by implementing the new system of institutional financing;
- developing the European cooperation in the RDI area by promoting two strategic projects: the International Centre for Advanced Study Danube - Danube Delta - Black Sea and the Extreme Light Infrastructure (ELI);
- the national strategy for lifelong learning;
- creating the reference curriculum skills upgrading oriented;

[22] Ibid., p. 19.
[23] Idem.
[24] It can be accessed on: http://register.consilium.europa.eu/pdf/ro/11/st00/st00024.ro11.pdf
[25] Pp. 31-36.

- prioritizing the public investment in order to achieve competitiveness by creating a high-level working group under the direction of the Prime Minister, including a list of priority investment projects for which funding may be provided in the next 3-5 years;

- the sale on financial markets of major packages of shares in state companies;

2. Promoting employment:

- creating a unitary waging framework in the public sector by adopting the framework Law on the staff's unitary salaries paid from public funds;

- strengthening the social dialogue and rendering more flexible the system of collective work agreements;

- measures to promote flexicurity and employment through amendments to the Labour Code;

- implementing the national strategy on reducing the incidence of undeclared work for 2010-2012;

- adopting the draft law on the exercise of occasional activities performed by labourers;

- amending and supplementing the legal framework for the unemployment insurance system and employment stimulation;

- amending and supplementing Law no. 279/2005 on apprenticeship to the workplace;

- the reform of the legal framework for adult training;

- implementing the simplified European framework for the recognition of professional qualifications, in terms of reciprocity, between Member States;

- initiating procedures for the classification of universities into categories, based on the evaluation of study programs and on their institutional capacity: mostly educational universities, universities for scientific research and artistic creation and universities for advanced research and education.

3. Strengthening the sustainability of public finances:

- implementing the Law on the unitary pension system providing:

(i) the gradual increase of the retirement age to 65 years for men and 63 for women until 2030, as well as the gradual increase of the complete contribution period to 35 years for women and men, by 2030;

- (ii) the introduction of stricter criteria for the access to partial early retirement;

- (iii) the gradual introduction of a mechanism for indexing pensions depending on inflation, by introducing into national law, a numeric rule for the general budget deficit under the Maastricht Treaty;

- further fiscal consolidation given a budget deficit of 5% of GDP in ESA terms for 2011 and less than 3% of GDP in 2012;

- reducing the arrears of the general budget by restructuring the health sector and by strengthening the budgetary discipline at local authorities level, by applying the recently approved amendments to the Law on local public finances;

- the implementation of the parental allowance program;

- improving the flexibility of the school educational system;

- defining the legislative framework on social assistance including also social services and benefits.

4. Strengthening the financial stability:

- Romania has applied since 2004, a series of measures to reduce the vigour of forex loans, using a wide range of tools, some of which still remain in force, even after the adjustments undertaken in connection with the accession to EU requirements;

- additional measures to ensure the comprehensive implementation of IFRS (International Financial Reporting Standards) by the banking sector since 2012;

- by the end of June 2011, the NBR will issue recommendations for prudential filters to further ensure a prudent policy in terms of solvency and bank reserves;

- amending the legislation for the purpose of allowing the use of Fund resources of the Bank Deposit Guarantee (FRBDG) to finance the restructuring approved by the NBR on the transfer of deposits, including the operations of assets transfer and assuming liabilities;

- develop procedures necessary to implement the new duties of the central bank and FRBDG in restructuring the credit institutions, as well as the FGBDG immediate access to government funds, if necessary;

- reconsidering the regulations of the legal framework on the liquidation of credit institutions to take measures, if necessary, in order to ensure their consistency;

- the increase, by NBR, of the scope of instruments accepted as guarantees in refinancing operations by including the bonds issued in lei by international financial institutions listed on BSE and Sovereign Eurobonds;

- establishing a prudential treatment of the temporary holding of equity, resulting from the restructuring of loans in order to avoid the weakening of the financial position of banks;

- monitoring the loans in foreign currency and making the necessary arrangements for their price to reflect accurately and transparently the risk of granting them to debtors at risk; - failing to transpose the draft legislation on insolvency of individuals and debt recovery, which could undermine the debtors' discipline;

- adopting additional measures by the Central Bank on the contingency plan, in order to avoid systemic risk in the banking sector.

Chronologically, concerning the documents developed in the European Union, we notice that one month after the presentation of the Report of Ministers participating in the Euro-Plus Pact, on July 21st, 2011, Ministers of the Eurozone, together with representatives of EU institutions, signed the "Declaration of the Heads of State or Government of the Eurozone and EU institutions"[26]. Since this is a declaration, that is, a document not legally binding, but a document of principles, the legal commitments lack, but it is worth mentioning some provisions related to our subject. Thus, those who signed the Declaration, inter alia, required "the rapid completion of the legislative package strengthening the Stability and Growth Pact and the new macroeconomic surveillance. Eurozone Member States will fully support the Polish Presidency to reach an agreement with the European Parliament on voting procedures in the preventive component of the Pact"[27]. However, they agree "that it would be needed in the EU regulatory framework" to rely "less on external credit ratings, given the recent Commission proposals in this direction"[28]. In the end of the Declaration, the European Council President, after consultation with the European Commission President and the Eurogroup President, is invited until October 2011, to make proposals on how to improve working methods and enhance crisis management in the Eurozone.

At the completion date of this brief presentation of some EU initiatives on the financial crisis, the economic and financial situation in Europe, and not only, worries the world, again. This is why, at the meeting of September 12, 2011, the so-called "package of six proposals" was adopted, "package" which refers to six pieces of legislation designed to strengthen the economic governance in the EU. Four of those proposals relate to tax issues, including a reform to the Stability and Growth Pact of the EU, while the other two are intended to identify and effectively approach the economic imbalances within the EU and the Eurozone.

[26] It can be accessed on: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/RO/ec/124001.pdf.
[27] Paragraph 13 of the Declaration.
[28] Paragraph 15 of the Declaration.

In the margins of the European Council meeting on 1-2 March 2012, 25 European leaders signed the Treaty on Stability, Coordination and Governance (TSCG) aimed at strengthening fiscal discipline and introducing stricter surveillance within the euro area, in particular by establishing a "balanced budget rule". The content of the treaty had been endorsed at the last European Council meeting in January[29].

4. Conclusions

We conclude our brief presentation, by reproducing two statements of those who attended the meeting of September 12, 2011, namely Herman Van Rompuy, the European Council President and Donald Tusk, Prime Minister of Poland. The first said that "We face a difficult period and this new set of rules and procedures, which were discussed in the Task Force last year, and have subsequently been transposed into law, represents an important step in the process of strengthening the macroeconomic surveillance and fiscal discipline"[30]. Donald Tusk said: "Our main task at this time - in cooperation with the European Council President, European Commission and European Parliament - is to work towards adopting, already in September, all regulations necessary for economic governance, meaning the so-called "package of six proposals"[31].

References

- Regulation No. 407/2010 of the Council of May 11, 2010 establishing a European mechanism of financial stabilization;
- Commission Communication to the Council and to the Economic and Financial Committee on European financial stabilization mechanism, COM (2010) 713 final of November 30, 2010;
- Consolidated version of the Treaty on the functioning of the European Union;
- The Council Conclusions 24 to 25 March 2011, Brussels;
- http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/RO/ec/120300.pdf);
- http://register.consilium.europa.eu/pdf/ro/11/st00/st00024.ro11.pdf;
- http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/RO/ec/124001.pdf;
- http://www.european-council.europa.eu/home-page/highlights/on-the-way-to-agreement-on-the-six-pack.aspx?lang=ro;
- http://european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=ro

[29] http://european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=ro

[30] http://www.european-council.europa.eu/home-page/highlights/on-the-way-to-agreement-on-the-six-pack.aspx?lang=ro

[31] Idem.

CASE-LAW ASPECTS CONCERNING THE REGULATION OF STATES OBLIGATION TO MAKE GOOD THE DAMAGE CAUSED TO INDIVIDUALS, BY INFRINGEMENTS OF EUROPEAN UNION LAW

Roxana-Mariana POPESCU*

Abstract

The priority principle of EU law in relation to the internal law of the Member States, a principle enshrined by the Court of Justice case-law and the principle of direct effect allow the national court to give full effect to EU law. Breaching the EU law by Member States draws under certain conditions their responsibilty for the breach thereof. Unlike public international law, the constitutive treaties do not contain provisions relating to liability of Member States for breach of EU law. As in other cases, the Court was the one that, over time, has defined a right of redress, which has its foundation in EU law and in the conditions necessary to engage the victims' right to repair.

Keywords: *Liability of Member States, EU law, priority principle of EU law, Court of Justice, case-law aspects.*

1. Introduction

The priority principle of EU law in relation to national law of Member States, jurisprudentially enshrined by the Court of Justice, and the principle of direct effect allow the national court to provide absolute effect to EU law. The non-compliance with EU law, by Member States, draws, under certain conditions, the states' liability for its breach.

Unlike public international law, the constituent Treaties do not contain provisions relating to the liability of Member States for breaching EU law.

As in other cases, the Court of Justice is the one that, over time, has defined a reparatory law, which is grounded on EU law and on the necessary conditions in order for the right to compensation to be committed, in the victims' benefit. Thus, the Court has supplemented this protection of litigants' rights, by enshrining the principle of state liability for breaching EU law. This principle applies when a Member State fails to transpose or when it incorrectly transposes an EU rule, but also for the breach of EU rules, with or without direct effect.

Next, we shall highlight the main moments in the consecration, by judicial way, of the principle of states obligation to make good damage caused to individuals, by breaches of EU law.

2. Francovich Judgement[1]

The Court of Justice enshrined for the first time, the principle of Member States liability for the breach of EU law in *Francovich*[2] Judgement, from 1991.

* Senior Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (e-mail: rmpopescu@yahoo.com).

[1] ECJ Judgement of 19 November 1991, *Francovich and Bonifaci* v. *Italy*, C-6/90.

By the Ordinance of July 9, 1989, registered at the Court on January 8, 1990, the national Court[3], under article 234[4] TEC, filed an application for a preliminary ruling on the interpretation of the third paragraph of Article 249[5] of the Treaty establishing the European Community and on Council Directive no. 80/987 on the harmonization of Member States laws on the protection of employees in case of insolvency of their employer. Thus, the national Court asked the Luxembourg Court if the Italian Government's liability for failing to transpose a directive, which had caused damage to an Italian citizen, could be committed, on the one hand, and if the individual could require an indemnity[6], from the Member State which had not fulfilled its obligation to transpose the directive, on the other hand.

Regarding the first question, the Court established that the directive had no direct effect[7], therefore people injured in their right, could not invoke before the competent national Court, the Directive provisions against the State.

We consider that the point of view of the Luxembourg Court is interesting for our study, more exactly the point of view regarding the second question of the Italian Court, namely the existence and extent of state liability for damages caused by the infringement of obligations arising from EU law. In its decision, the Court referred to the following aspects: the principle of extra contractual liability of a state; the conditions under which state liability can be committed, the principle of the obligation to compensate and state liability limits.

2.1. The consecration of the principle of extra contractual liability of Member States

We notice, to a careful analysis of the Court's Judgement that the Luxembourg Court starts in its motivation, primarily from highlighting the major principles developed by judicial interpretation.

---

[2] Circumstances of the case: Andrea Francovich, part in the main proceedings in Case 6 / 90, was employed to the CDN Elettronica SnC enterprise in Vicenza. From his position, he had received only occasional payments, in advance, of the amounts which were rightfully his, as wages. Consequently, Francovich brought an action before the competent Italian Court, which condemned the accused company to pay a sum of approximately 6 million Italian liras. During the execution phase of the decision, the executor of the Court issued a report finding the debtor's insolvency. Under those circumstances, Andrea Francovich invoked his right to obtain, from the Italian State, the guarantees provided in Directive 80/987 or, alternatively, damages-interests. The Directive invoked has to provide employees a minimum of protection at Community level, in case of insolvency of the employer, subject to more favourable national provisions, regulating, in particular, specific guarantees for payment of wages. The Directive had to be transposed into national law of Member States, no later than October 23, 1983. By the Judgement of February 2, 1989, the ECJ found that Italy had not fulfilled its obligation to transpose the Directive. For details, see **Sergiu Deleanu, Gyula Fabian, Cosmin Flavius Costas, Bogdan Ionita**, *"Curtea de Justiţie Europeană. Hotărâri comentate"*, (Editura Wolters Kluwer, Bucureşti, 2007), p. 233.

[3] Pretura di Vicenza, Italy.

[4] The current art. 258 TFEU.

[5] The current art. 288 TFEU.

[6] Emphasis added.

[7] In its argumentation, the Court recalled that the provisions of a Directive may have direct effect only if they are unconditional and sufficiently precise. In this case, the examination of the accomplishment of those criteria was made by determining the beneficiaries and content of the guarantee, as well as the identity of the guarantee debtor. In terms of beneficiaries and content of the guarantee, the Court held that they were sufficiently precise and unconditional. However, regarding the identity of the debtor, the conditions are not achieved, as long as Member States may finance the public funds of the guarantee with exclusively public means, but also they may resort to the employers' contributions. As a result, the Court stated: although the directive provisions are sufficiently precise and unconditional, as for the determination of the beneficiaries of the guarantee, its content does not offer sufficient evidence for individuals to be able to invoke the provisions of a directive before national Courts. In this respect, on the one hand, these provisions do not specify the identity of the guarantee debtor and, on the other hand, the state can not be considered debtor for the sole reason that it has not taken the necessary measures to transpose the directive within the prescribed period.

Thus, the Court reiterates that the Treaty establishing the European Economic Community creates its own legal order, integrated in the legal systems of Member States, which is imposed not only to them, but also to nationals of Member States[8]. The Court recalls that national Courts are obliged to apply EU law, to ensure the full effectiveness of EU rules and to protect the rights that EU law confers on individuals[9]; next, the Court indicates that the effectiveness of Union rules, as well as the protection of rights would be jeopardized if the possibility of obtaining compensation was not recognized to individuals, in the case where their rights from EU law were violated, breach attributable to the state[10]. Moreover, the Court states that the principle of state liability for damage caused to individuals, as result of the infringement of Community law, is inherent in the system of the Treaty[11], and the obligation of Member States to make good such damage is grounded on article 5[12] of the Treaty[13].

In paragraph 37 of the Judgement, it is clearly stated that Community law imposes the principle under which Member States are compelled to repair the damage caused to individuals, by the breach of Community law, attributable to them.

After analyzing the Union Court's reply, we can say that the ground for state liability in this case, is found both in provisions of the Treaty establishing the European Community, as well as in the Court's previous case-law that covers the relation between EU law and national law of Member States, in general and the direct application (together with the direct effect), as well as the application, as a priority, of EU law before national law.

Thus, the principle of state liability was consecrated. This principle is specific to EU law and represents "a right to compensation in the benefit of individuals, allowing, as outlined in the doctrine, the material and financial concretization of Community rule"[14].

2.2. The conditions under which state liability may be committed

Point b) of the Judgement intends to identify the conditions under which states can be held liable. According to the Court, while the state liability for damages caused to individuals by infringements of EU law, for which it is responsible, has its legal basis in the EU law itself, the conditions under which a right to compensation arises, depend on the nature of the EU law breach

[8] According to paragraph 31 of the decision: "We recall that the Treaty establishing the EEC has created its own legal system, integrated into the legal systems of Member States and which is imposed to their judicial organs, that the subjects of this legal system are not only the Member States, but also their nationals and that, as the Community law creates obligations for individuals, in the same manner the Community law can also create rights included in their legal heritage; these rights arise not only when they are specifically mentioned in the Treaty, but also under obligations that the Treaty imposes both to individuals, as well as to Member States and Community institutions".

[9] In this regard: paragraph 32 of the decision, according to which it should be remembered that, under the constant case-law of the Court, the national judicial bodies are responsible with the application of Community provisions, with ensuring the absolute effectiveness of these rules and with the protection of rights that they confer on individuals.

[10] Paragraph 33: It should be recognized the fact that the very effectiveness of Community rules would be jeopardized and that the protection of rights that they enshrine would be diminished, if individuals were not able to obtain compensation when their rights were breached by failure to comply with Community law, attributable to the State.

[11] Paragraph 35 of the Judgement.

[12] The current art. 4 TFEU. According to this article, Member States shall take all necessary measures to ensure the fulfilment of incumbent obligations, under EU legal rules.

[13] Paragraph 36.

[14] **Roxana Munteanu**, *"Rolul jurisdicţiilor naţionale în aplicarea principiului răspunderii statului pentru daunele cauzate particularilor prin încălcarea dreptului comunitar"*, in *Dreptul comunitar şi dreptul intern. Aspecte privind legislaţia şi practica judiciară*, (Editura Hamangiu, Bucureşti, 2008), p. 63.

which is at the origin of the damage caused[15]. In this case, when a Member State ignores its obligation under the Treaty, to take all measures necessary in order to achieve the result required by a EU rule, the full effectiveness of that rule requires the granting of a right to compensation, if three conditions[16] are met, namely:

- the directive must create rights in the individuals' patrimony;
- the content of these rights must result from the directive provisions;
- the existence of a causal link between the infringement of any obligation, by the state and the damage caused to the person injured.

The Court considers that these three conditions are sufficient to give rise, in the individuals' benefit, to a right to receive compensation, right that is directly grounded on Community law[17].

The Judgement covers naturally, only those conditions under which the state is liable before individuals, for failure to implement or for incorrectly implement a directive. Thus, in *Francovich* Case, the Court's Judgement does not provide answers, but questions such as: may the state liability be committed in cases other than those when the state breaches obligations relating to the transposition of directives? Is the state liable only if it breaches a Union rule which has direct effect, or may its liability be committed also in other EU rules? Given that the conditions required are fulfilled, is the state liability lawfully committed (without checking other elements, such as: guilt, possible causes of removing liability)?

The Luxembourg Court of Justice answered at some of those questions, developing in time an important case-law.

3. Brasserie du pêcheur[18]

Francovich Judgement has the merit to have grounded the principle of European Union Member States obligation to make good damage caused to individuals, by breaches of EU law, but it "has also unleashed an avalanche of studies and analysis that whether noticed the attitude of the Court of Justice or they strongly contested it"[19]. It should also be noted that although the Court gave response to concerns about the protection of individuals' rights, by the proclamation of that principle, *Francovich* Judgement generated a series of new issues referring on the one hand, to the scope of the principle, and on the other hand, to the general conditions for committing liability. According to the General Attorney, Giuseppe Tesauro, the issue of state liability for infringements of Community law, very important both in terms of principles and consequences that a comprehensive and general definition of such liability might have for Member States, is complex and certainly has some traps, as demonstrated in the rich doctrinal debate developed in this respect, in recent years[20].

A key decision to ground the principle of Member States obligation to make good for damage caused to individuals, by the breach of EU law, was ruled in the *Brasserie du Pêcheur* Case[21]. In that

[15] Paragraph 38 of the decision.

[16] These are clearly shown, in paragraph 40 of the decision.

[17] Paragraph 41.

[18] ECJ Judgement, 5 March 1996, *Brasserie du pêcheur / Bundesrepublik Deutschland and the Queen / Secretary of State for Transport, ex parte Factortame e.a.* C-46/93.

[19] **Carol Harlow**, *"Francovich and the problem of the disobedient state"*, European Law Journal (1996), p. 103.

[20] Conclusions presented at the meeting of November 28, 1995.

[21] Circumstances of the case: *Brasserie du pêcheur* SA, a French brewery based at Schiltigheim (Alsace), was forced to discontinue exports of beer to Germany in late 1981 on the grounds that the beer it produced did not comply with the "purity" requirement of the Biersteuergesetz ("BStG"). Further controls on retailers, made by the German

case, since the Luxembourg Court had already established that the Member State was responsible for the infringement of EU law, *Brasserie* requested German courts to cover the prejudice suffered, meaning the profit losses caused by the restrictive provisions of German law. The national court, Bundesgerichtshof, ruled that, under the German law for Government's liability, the state did not have to be held liable for the inaction of the state legislative power, especially since it did not contain provisions covering the protection of rights of a third party. In this case, estimating that German law does not provide any basis for allowing a repair of the damage caused to the applicant, the German court sent to the Luxembourg Court a request for a preliminary ruling to determine if the principle of state liability for damage caused to individuals, by the breach of EU law, damage attributable to the state, as shown in *Francovich* Judgement, applies also to the litigation brought before that court. More specifically, the Court was asked to answer the following questions:

- does the principle of EU law, according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of infringements of Community law attributable to the state also apply where such an infringement consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law?;

- may the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example, for where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

- may the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence), on the part of the organs of the State responsible for the failure to adapt the legislation?

- if the answer to the first question is affirmative and the answer to the second question is negative:

a) may liability to pay compensation, under the national legal system, be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

b) does the obligation to pay compensation also require the reparation of the damage already incurred before it was held in judgement of the Luxembourg Court of March 12, 1987 (C-178/84) that article 10 of the German Biersteuergesetz breached higher-ranking Community law?

In other words, the Court had to determine if the State had any obligation to make good the damage and, if so, under what conditions and for which types of damage, towards individuals who had suffered prejudices due to the application of national laws contrary to EU law.

First, the Court had to determine if it was necessary, in that case, to define *the obligation to make good damages* caused by the application of a national law contrary to rules of the Union, given the fact that in *Francovich* Judgement, the Court had stated that the failure to transpose a directive, under certain conditions, was committing the state liability.

---

authorities, who contested the compliance of the beer quality with the law, determined the only German importer of *Brasserie du pêcheur* not to renew the distribution contract. By Judgement of 12 March 1983, the Court held that the prohibition on marketing beers imported from other Member States, considered inconsistent with BStG, was incompatible with Article 30 EC. *Brasserie du pêcheur* brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1.8 million, representing only a fraction of the loss actually incurred. The action being dismissed by lower courts, *Brasserie du Pêcheur* maintained the same conclusions in the appeal before the Bundesgerichtshof. As the infringement mentioned must be considered as an omission of the legislative body, because it did not change BStG in accordance with Community law, the Bundesgerichtshof points out that the damage reparation is provided in the Federal Republic of Germany, by the German Civil Code provisions – *"BGB"* and the Basic Law (Grundgesetz).

Secondly, it was necessary to determine if, subject to the reservation of limits identified by the Court, the conditions for liability were the proper conditions of each national legal order or if EU law required, at least, the sufficient *substantive conditions* in order for the defaulting Member State to be required to make good the damage caused. Also, in terms of causation, it was necessary to assess if, by its nature, the infringed Union provision allowed the individual to directly defend his rights in order to eliminate the already established illegality regarding the substance.

Finally, it was necessary to bring into discussion *the procedural conditions* regulating the right to compensation, and the criteria for evaluating the damage dimension.

What has the *Brasserie du Pêcheur* Judgement brought new? First, through this decision, the Court clarifies the principle of Member States obligation to make good for damage caused to individuals, by the breach of EU law and, on the other hand, the extension of the mentioned principle scope is found[22]. Thus, as for the clarification of the principle, we notice that the Judgement contains a list of general conditions to be fulfilled in order for the obligation of the defaulting state to be committed, namely:

- the breached rule of law must confer subjective rights on individuals;
- the breach must be sufficiently serious;
- there must be a causal link between the breach of obligation and the damage suffered.

In addition to this list, we find also the clarification of these conditions and the necessary tools for their adequate application. If, as for the first[23] and third condition, things are clear, with no difficulty whatsoever in their application, in the case of the second condition, its application (check) has encountered some difficulties. Why? Because we believe that it is quite difficult to give an objective answer on the following two questions: "what is a sufficiently serious breach"? and where begins the limit when the breach becomes *sufficiently* serious? This time too, the Court attempts and for the moment also manages to present a series of tools, which could be used to provide an accurate assessment of the gravity of EU law infringement, by the respective Member State. In this respect, according to the Court, the concrete analysis of each case must take into account the following factors[24]:

- the degree of clarity and precision of the rule infringed;
- the extent of discretion that the rule infringed leaves to the national authorities;
- the intentional or culpable character of the rule infringed;
- the excusable or inexcusable character of any possible error of law;
- the extent to which the Community institutions attitude contributed to the infringement by the Member State.

And yet, what is a breach of EU law, given the tools provided by the Court? For example, a breach of EU law is manifest, meaning serious enough, if the state persists to infringe EU law, although there is a decision establishing this fact or a constant case-law of the Court, which establishes that the respective conduct represents a breach of EU law.

With regard to the extent of the principle scope, it follows from the content of the decision that the principle is applicable, regardless of the state body that has breached EU law.

---

[22] **Paul Craig, Gráinne de Burca**,*"EU Law. Texts and Cases"* (Oxford University Press, London, 2003), p. 330.

[23] What is, however, *"to create subjective rights in the individuals' patrimony?"* How can it be checked, in practice, if a rule meets this condition? In the *Brasserie du pêcheur* case, the Court of Justice did not provide any definition, but only noted that in that case, the condition was fulfilled.

[24] Paragraph 56 of *Brasserie du pêcheur* Judgement, cited above.

Compared with *Francovich* Judgement, where the breach of EU law was represented by the failure to transpose a directive, in the *Brasserie du pêcheur* case, there was an infringement resulting from the fact that the national law was contrary to EU law.

4. Köbler[25]

Although the *Brasserie du pêcheur* Judgement brought additions and clarifications in the matter of EU Member States liability for breaching EU law, another aspect remained, however, unanswered, namely: does the Member States liability for acts of the judicial authorities represent grounds for committing liability? This issue appears because, from the content of the *Brasserie* Judgement, one can infer (interpret) that the principle is also applicable in the situation where the EU infringement is committed by a national Court. However, this interpretation does not result explicitly from the ruling of the Court. Thus, seven years after the ruling in *Brasserie du pêcheur* case, this aspect was also clarified in the decision to *Köbler* case[26].

In this case, *Köbler* sued the Austrian state for compensation, showing that the Austrian Administrative Court had infringed EU law, causing him damage by not paying the proper addition based on seniority. The Austrian state defended itself arguing that the Administrative Court decision had not breached EU law, since the purpose of such bonus was the reward of employees' loyalty who had been working at least 15 years continuously, serving the same employer, meaning the Austrian state[27].

However, Austria's representatives argued that the state obligation to offer compensations could not be grounded on an ultimate ruling (as it was the Austrian Administrative Court ruling). In this dispute, the Court that had to rule on Mr. *Köbler's* claims, considered necessary to receive further clarification of the Luxembourg Court, in order to solve the case, which is why it addressed several questions to the Luxembourg Court of Justice[28], of which, relevant to our analysis, is the next: "does the Court case-law according to which the State liability is committed in case of Community law infringement, regardless of the Member State body which is being held liable for this breach (especially *Brasserie du Pêcheur* joined decisions) apply also if the alleged behaviour of the body, contrary to Community law stems from a decision of the Supreme Court of a Member State, in this case of Verwaltungsgerichtshof?"[29]

---

[25] ECJ Judgement of 30 September 2003, *Gerhard Köbler c. / Republik Österreich*, C-224/01.

[26] Circumstances of the case: Professor Gerhard *Köbler* had worked at various universities in Germany and Austria. In 1996, he requested the Administrative Court (Verwaltungsgerichtshof) to compel the employer to grant him an age addition, addition provided in Austrian law and taken into account when calculating the pension. *Köbler* showed that even though he had not worked 15 years at an Austrian university, he was meeting that condition of length of service, taking into account the years when he had been professor at other universities in Member States of the Community. He had demonstrated that it was meeting that condition of service, taking into account the years of activity from other universities in the Community. Mr. *Köbler* also claimed that disregarding the period in which he had been professor at other universities in the Community, constituted indirect discrimination contrary to Article 39 of the Treaty and Council Regulation no. 1612/68 on the free movement of workers within the Community. The Austrian Administrative Court, by the closure of 22 October 1997, required a preliminary ruling asking the ECJ if Article 48 TEC could be interpreted in the next situation: if when calculating the length of service, the seniority obtained in other European countries should be also included.

[27] According to paragraph 11 of *Köbler* Judgement.

[28] **Sergiu Deleanu**, **etc**., *op. cit*., p.367-368.

[29] **Laura Ana-Maria Vrabie** (coordinator), *"Jurisprudența istorică a instanțelor comunitare - culegere de hotărâri integrale",* vol.2, European Institute of Romania, Translation Coordination Department, Bucharest, 2008, p. 450.

The Luxembourg Court gave to this question, a very clear answer, namely: the principle according to which Member States are obliged to make good damage caused to individuals, by infringements of Community law for which they are responsible is also applicable when the alleged infringement stems from a decision of a court adjudicating at last instance. That principle, inherent in the system of the Treaty, applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation. Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system"[30].

In other words, the Court held that, given the "specificity of the judicial service" and the legitimate requirements of security in legal relations, the State liability for damage caused to individuals, by infringements of EU law in cases where the infringement resulted from a Court decision, was governed by the same conditions as any other infringement of EU law, by the state. Thus, the ruling "puts the judicial grounds for the developing of the law of Member States liability for infringements of Community law"[31], started by *Francovich* ECJ Judgement.

Köbler Judgement too represents only a stage in the evolution of the principle of Member States liability for damage caused to individuals, by infringements of EU law.

5. Traghetti del Mediterranea[32]

Three years after the ruling in *Köbler* case, on June 13, 2006, the European Court of Justice issued a new decision, which has the merit of having cleared conditions under which a Member State is liable for damage caused to individuals by infringements of EU law, as a result of decisions of national Courts adjudicating at last instance.

In the *Traghetti del Mediterraneo*[33] case, the Geneva Courthouse asked the Luxembourg Court to answer the following questions: does EU law, in particular principles set out by the Court in *Köbler* case, oppose to a national regulation, in this case the Italian law, which on the one hand, excludes any Member State responsibility for damage caused to individuals by infringements of EU law, by a national Court adjudicating at last instance, the breach resulting from the misinterpretation

[30] *Ibidem*, p. 443-444.

[31] **Camelia Toader**, *"Curtea de Justiție a Comunităților Europene. Hotărârea Curții din 30 septembrie 2003"*, Analele Universității din Bucureşti, Seria Drept, no. IV/2004, (Editura All Beck, Bucureşti, p. 129.

[32] ECJ Judgement, 13 June 2006, *Traghetti del Mediterraneo SpA v. / Repubblica Italiana*, C-173/03.

[33] Circumstances of the case: in 1981, the shipping company *Traghetti del Mediterraneo* ("TDM") sued a rival company, *Tirrenia di Navigazione*. TDM wanted to obtain compensation for damage caused by the competitors because of practicing a low tariff policy on routes between Italy and Sardinia, respectively, Sicily, policy made possible by benefiting of public subsidies. TDM claimed that the granting of such public subsidies was an act of unfair competition, being prohibited by the Treaty establishing the European Community. TDM's action was dismissed, in turn, both at first instance, as well as on appeal and recourse. Considering that the judgement of the Court of Appeal was based on an incorrect interpretation of the provisions of Community law, TDM, company that, meanwhile, went into liquidation, sued the Italian state, before the Genoa Court. TDM requested the Court, the reparation of damages that the company had suffered because of the misinterpretation of the Court of Appeal. TDM also wanted to be demonstrated that the mentioned Court had infringed the Community law, by not complying with its obligation of asking ECJ for a preliminary ruling.

of EU law or from the incorrect assessment of facts or evidence and, on the other hand, is this kind of liability limited only to cases of intent or serious negligence of the Court.

Starting from the idea according to which excluding the possibility that the State responsibility would be committed when the EU law infringement resulted from the interpretation of a Union provision or incorrect assessment of facts or evidence, would prejudice the effectiveness of the liability established by *Köbler* decision, the Court answered both questions, as it follows[34]:

- Community law makes inapplicable the national legislation which excludes State liability, in general, for any damage caused to individuals by infringements of Community law, caused by a Court of last instance, when the breach is the result of a misinterpretation of a Community rule or an incorrect assessment of facts and evidence;

- Community law makes inapplicable the national legislation which limits such liability solely to cases of intentional fault or serious negligence by the Court, if such a restriction leads to the removal of state liability in other cases where a manifest breach of the applicable rule was committed.

6. Kapferer[35]

Remaining loyal to the principle of Member States responsibility for damage caused to individuals by infringements of EU law, the Luxembourg Court of Justice adjudicates again, in 2006, and the decision is part of the post-*Köbler* evolution of the principle mentioned.

In this respect, we bring to the forefront of attention the *Kapferer*[36] Judgement. In this case, the Court of Appeal (Landesgericht Innsbruck) filed a request for preliminary ruling. One of the questions was related to the fact if the national Court had, and if so, under what conditions, the obligation to reopen a case and to invalidate a final and irrevocable decision contrary to EU law regarding the international case-law.

Starting from the idea that the principle of *res judicata* is recognized both in the legal systems of EU Member States and in the European Union, the Court stated that, in order to ensure the stability of legal relations and the proper administration of justice, it was important that Court decisions which would become final after having exhausted all appeals or after the expiry of their exercise periods, could not be brought again in discussion[37].

---

[34] *Communiqué de presse n° 49/06*, 13 June 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060049fr.pdf)

[35] ECJ Judgement, on 16 March 2006, *Rosmarie Kapferer v. / Schlank & Schick GmbH*, C-234/04.

[36] Circumstances of the case: as a consumer, residing in Tirol (Austria), Ms. *Kapferer* received from Schlank & Schick company (company established in Germany), a promotional material by which she was announced that she could win a prize of 3906,1 €. Receiving the award was subject to an order-test without, however, involving any commitment. Ms. *Kapferer* sent the order form to Schlank & Schick, but it was not possible to determine whether, in fact, she had ordered something on that occasion. By not having received the prize she thought she had won, Ms *Kapferer* brought an action against Schlank & Schick, before Bezirksgericht Hall in Tirol (the Austrian Court), seeking payment of € 3906.1, plus interest. Schlank & Schick claimed, under Regulation no. 44/2001 on case-law, recognition and enforcement of judgements in civil and commercial matters, that the Austrian Court had no jurisdiction, as defined in the Regulation, to hear the case. Bezirksgericht Hall in Tirol dismissed the application. Under those circumstances, Ms. *Kapferer* brought the case before the Landesgericht Innsbruck. Schlank & Schick did not appeal the first instance judgement, so in that respect, the judgement was final.

[37] *Communiqué de presse n° 423/06*, 13 march 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060023fr.pdf)

Thus, according to the Court, the answer to the question formulated by the Court of Appeal is negative, meaning that the principle of cooperation, provided by article 4 TFEU does not compel a national Court not to apply its own rules of procedure, in order to review and repeal a final and irrevocable decision contrary to Community law[38].

7. Conclusions

The principle of obligation of Member States of the European Union to make good the damage caused to individuals by infringements of EU law is one of the fundamental principles ensuring the full effectiveness of EU law.

The consecration of this principle is one of the most significant developments of the case-law, along with other principles, such as the direct effect and the priority of EU law in relation to national law.

Without the recognition of this principle, the direct effect of EU law would have probably been only partially effective for the exploitation of the legal rights conferred on individuals, by EU rules.

It should be noted that the affirmation of the principle of states responsibility for damage caused to individuals was evolutionary, if we consider the extension scope, starting from acts of the executive to all State authorities, whichever is their function, using, however, the same argument and logical line from *Francovich* Judgement and from other judgements fundamental for the shaping of EU law, as autonomous legal order.

In *Brasserie du pêcheur* Judgement, the Court held that the principle of state responsibility, being inherent in the system of the Treaty, was valid for any breach of EU law, whichever was the national body whose act or omission was responsible for the breach[39]. By this statement, the Court no longer acts only under the EU Treaty system, but also under the mandatory principle of the uniform application of Community law and of the useful comparison with state responsibility in international law[40].

References

- Craig, Paul; de Búrca, Gráinne, „*EU Law. Texts and cases",(* Oxford University Press, London, 2003);
- Deleanu, Sergiu; Gyula, Fábián; Costaş, Cosmin Flavius; Ioniță Bogdan, „*Curtea de Justiție Europeană. Hotărâri comentate"*, (Editura Wolters Kluwer, Bucureşti, 2007);
- Harlow, Carol, „Francovich and the problem of the disobedient state", (European Law Journal, 1996);
- Munteanu, Roxana, „Rolul jurisdicțiilor naționale în aplicarea principiului răspunderii statului pentru daunele cauzate particularilor prin încălcarea dreptului comunitar", în Dreptul comunitar şi dreptul intern. Aspecte privind legislația şi practica judiciară, (Editura Hamangiu, Bucureşti, 2008);

[38] *Idem*.

[39] Paragraph 32 in conjunction with paragraph 31 of *Brasserie du Pêcheur* Judgement.

[40] According to conclusions of the General Advocate Philippe Léger in *Köbler* Case, presented on 8 April 2003, paragraph 42.

- Quoc, Dinh Nguyen, *„Droit international public", ediția a șasea revizuită integral de P. Daillier si A. Pellet, LGDJ, 1999*;
- Simon, Denys, „La responsabilité de l'État saisie par le droit communautaire", (AJDA, iulie-august 1996).
- Toader, Camelia, „*Curtea de Justiție a Comunităților Europene. Hotărârea Curții din 30 septembrie 2003*", Analele Universității din Bucureşti, Seria Drept, nr. IV/2004, (Editura All Beck, Bucureşti);
- Vrabie, Laura Ana-Maria (coordonator), „*Jurisprudența istorică a instanțelor comunitare - culegere de hotărâri integrale",* vol.2, Institutul European din România, Direcția Coordonare Traduceri, Bucureşti, 2008**;**
- ECJ Judgement, 5 March 1996, *Brasserie du pêcheur / Bundesrepublik Deutschland and the Queen / Secretary of State for Transport, ex parte Factortame e.a.* C-46/93;
- ECJ Judgement of 30 September 2003, *Gerhard Köbler c. / Republik Österreich*, C-224/01;
- ECJ Judgement, 13 June 2006, *Traghetti del Mediterraneo SpA v. / Repubblica Italiana*, C-173/03;
- ECJ Judgement, on 16 March 2006, *Rosmarie Kapferer v. / Schlank & Schick GmbH*, C-234/04;
- *Communiqué de presse n° 49/06*, 13 June 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060049fr.pdf);
- *Communiqué de presse n° 423/06*, 13 march 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060023fr.pdf);
- Conclusions presented at the meeting of November 28, 1995.

THE ASYLUM, BETWEEN HUMANITARIAN RESPONSE AND POLITICAL INSTRUMENT

Catrinel BRUMAR*

Abstract

At 9 November 2010, the European Court of Justice, in a preliminary ruling, decided to depart from the interpretation promoted by the United Nations High Commissioner for Refugees, in the matter of the application of the exclusion clauses. The European Court considered that no proportionality test between human rights protection and gravity of a crime is to be applied in the case of a person suspected of having committed an act contrary to the principles and purposes of the United Nations. By eliminating this test, the Court is sending a signal on rethinking the asylum institution, from a humanitarian tool that it became, to a political instrument. This decision could not be read alone; corroborated to the concerns already raised on the suitable use of the asylum instrument to address massive humanitarian needs, it would indicate a reorientation in the interpretation of international norms governing the refugee law. Still, the human rights organs and the European Court of Human Rights continue to refer to the asylum as a situation where a humanitarian perspective, reflected in the proportionality test, or for those mechanisms the risk of human rights violation probability test, is still valid. The two apparently divergent directions will need to converge in the implementation of the European Union regulations on asylum. This paper is exploring the possible reinterpretation of the European norms, trying to identify the new trends in the political perspective of asylum and the limitations to these trends that the respect for human rights is establishing.

Keywords: *refugee status, serious non political crime, act contrary to the purposes and objectives of the United Nations, proportionality considerations, preliminary ruling*

1. Introduction

The refugee law is in quest of a redefinition. The last twenty years have shown that the humanitarian perspective, reflected primary in the work of the United Nations High Commissioner for Refugees, although very appreciated, is not succeeding in coping with, on one hand, the massive influx of refugees which do not always fulfill the criteria set down in the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (here after "the Geneva Convention") and on the other hand with the restrictions imposed by the immigration regulations. The development of human rights law had a major impact on the interpretation and application of the refugee definition, extending it as far as the notion of discrimination and the standard of protection from the State of origin are concerned, but also weakening its political dimension. Against this background, new theories immerged, trying to rediscover the essence of asylum as refugee protection and to clarify its relation with the humanitarian approach[1].

* Senior Lecturer, Ph.D. candidate, Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (e-mail: catrinelbrumar@univnt.ro).

[1] Mathew E. Price, *Rethinking asylum: History, Purpose, and Limits* (Cambridge, CUP, 2009), p. 13

This rediscover also determines a reinterpretation of the exclusion clauses, i.e. those provisions in the Geneva Convention that are establishing the persons who, although having a well-founded fear of persecution, are undeserving of international protection because they committed certain acts that show the are unworthy, undignified of such a response from a State.

Traditionally, the application of the exclusion clauses were conditional, at least in part, by the performance of a proportionality test; a person fulfilling the criteria laid down in Geneva Convention would not be excluded from being a refugee if his or her need form protection overweighs the need to sanction the acts committed.

However, if one is approaching the refugee concept from a political perspective, the humanitarian considerations in the application of the exclusion clauses are no longer justified.

This trend seems to be adopted by the European Court of Justice in its recent case-law; in the context of the development of an European asylum law, where the European Court will play a major role as the only institution with the authority to interpret European Union regulations, it is clear that the direction she is offering is essential for all the Member States.

2. The context: factual background and questions referred

The judgment rendered on November 9th by the European Court of Justice in the cases Bundesrepublik Deutschland against B and D (joined cases C-57/09 and C-101/09)[2] was issued in a preliminary ruling proceeding generated by the German Federal Administrative Court, who asked the European Court to clarify the interpretation of the exclusion clauses from the refugee status, as stipulated by the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter "Directive 2004/83"), in its article 12.

This European piece of secondary legislation had the aim of ensuring that Member States apply common criteria for the identification of persons genuinely in need of international protection and of guiding the competent national bodies of Member States in the application of the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951.

According to its article 12, a person is disqualified from being a refugee where there are serious reasons for considering that, *inter alia*, he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; or he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations[3].The questions referred to the European Court aimed at a clarification of the notion of a "serious non-political crime" and of an "act contrary to the purposes and principles of the United Nations", in order to determine if the participation as a member in an organization listed as a terrorist one could be qualified as entering into one of the two categories of deeds excluding the person from being a refugee; they were also requesting a response on the application of a proportionality test between the seriousness of the crime, and therefore the need to condemn it and its perpetrator, and the risk faced by the person if disqualified from being a refugee.

[2] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83756&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=365610 [accessed 20 February 2012]

[3] Article 12 is also stipulating that a person is excluded from being a refugee if there are serious reasons to consider that he or she has committed crimes against peace or security, but this hypothesis is outside the scope of the present study.

Thirdly, the questions referred to the European Court were enquiring over the place, in the application of the proportionality test, of the existence in the national legal system, of protection against deportation under the prohibition of torture and other ill treatments rule.

The questions raised in fact some interesting issues relating to, on the one hand, the value of the United Nations High Commissioner for Refugees guide on implementation of the Geneva Convention and if this body's practice would be a source of inspiration for the European Court as it has been, for almost 35 five years for the national courts and, on the other hand, on the character of asylum, understood as protection for the refugees.

The German authorities seemed to have difficulties in determining whether, from the perspective of the European law, persons that belonged to organizations listed as terrorist were to be excluded from being a refugee; in fact, the lower German courts considered that an asylum seeker should not be excluded from being a refugee without a proper application of the proportionality test, even if he or she had committed, before being admitted on the German territory, a serious non-political crime. The two applicants in the domestic procedures were former members of organizations listed as terrorist in accordance with Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[4].

The request for asylum filled by the first applicant, B., was rejected as he confessed that as a schoolboy he had been a sympathizer of the Revolutionary People's Liberation Army/Front/Party (DHKP/C). Engaged in guerilla fighting for this organization in the period between 1993 and 1995, he was arrested and sentenced to life imprisonment, after giving statements under torture. While in prison, he was again sentenced to life imprisonment for the killing of a fellow prisoner. Released from custody on heath grounds, he left Turkey and entered Germany.

The second case was generated by the decision of German authorities to revoke the status of refugee, previously recognized to D., a former guerrilla fighter for the Kurdistan Workers' Party and one of its senior officials. He was a member of this organization since 1990, but in 2000, following some political differences with other leaders, he decided to leave the organization.

Two preliminary remarks are worth making in connection to these cases: the first one is related to the qualification of their conduct by the domestic jurisdictions as serious non-political crimes; the second remark concerns the demarche of the Federal Administrative Court (the instance that requested the preliminary ruling of the European Court): although this tribunal is acknowledging the fact it is bound by the findings of the lower courts, nevertheless, it is requesting the European Court to clarify if the conduct of the applicants is a serious non-political crime or an act contrary to the purposes and principles of the United Nations.

The relevant rules of international law at the time of the judgment

As mentioned in the previous sections of this article, the Geneva Convention represents the cornerstone of the international legal regime for the protection of refugees. In fact, as recognized by the European legislation, the Geneva Convention represents both the source of inspiration but also the goal, as the Directive 2004/83 sets as objective to achieve a common application of the criteria for the identification of persons genuinely in need of international protection. Against this background, it is useful to recall the main rules regarding the exclusion of certain persons from being refugees, on account of their conduct that makes them undeserving of international protection.

[4] Adopted on 27 December 2001, by the Council of the European Union in order to implement Resolution 1373 (2001) of the UN Security Council. Resolution 1373 was adopted on 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, on the basis of Chapter VII of the Charter of the United Nations.

According to article 1 F of the Geneva Convention, 'the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisionin respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

The first hypothesis is of no interest for the present study; the other two are invoked in the European Court's ruling and therefore deserve our attention. The intention of the drafters of the Convention was to ensure that important fugitives from justice are not able to avoid the jurisdiction of a state in which they may lawfully face punishment [5]. As far as the exclusion clause relating to the perpetration of a serious non political crime is concerned, it is to be noted that not all the extraditable offences were to be considered serious; although no list, exemplificative or exhaustive was drawn up, the drafters were determined to exclude the offences punishable by three months' imprisonment and referred to capital crimes [6] as being covered by the exclusion clause. It is also interesting to note in connection to this exclusion clause, that its application is only possible if the punishment faced by the asylum seeker were to be or would be applied in a non discriminatory way and that receiving States are not to ignore the risk that would be done by returning the claimant to face prosecution or punishment[7] or, in other words "the well-founded fear of persecution".

The United Nations High Commissioner for Refugees has, over the years, and in the fulfilling the task of supervising the application of the provisions of the Geneva Convention, issued series of Background Notes and Guidelines on the interpretation to be given to the conventional norms. Its task was truly remarkable taking into consideration the fact that the Geneva Convention is international in the affirmation of the refugee status, but essentially national in its application. Therefore, the role of the High Commissioner was to ensure as broad uniformity as possible in the application, by domestic authorities and courts, of the disposition of the Convention. And to combat the risk of very divergent interpretation on the notion of a refugee, it even elaborated a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention[8].

With respect to the exclusion clause for the commission of a serious non-political crime, the UNHCR firstly pointed out the offences that would attain the level of seriousness: crimes against the physical integrity of a person, crimes committed through the use of violence. The traditional interpretation of the UNHCR would place terrorist acts under this exclusion clause, as the alleged political objective of such acts is clearly annihilated by the violence of means and no longer predominant. The other exclusion clause of interest to this study refers to the commission of an act contrary to the purposes and objectives of the United Nations. Although there was agreement for the inclusion of this clause in the draft of the Convention, the reasons behind it were very diverse and confusing: some representatives limited its application to war collaborators in the Second World War or to acts similar to the gravity of war crimes, while others thought of it as a prohibition for refugees to engage in activities contrary to the country of origin. Another suggestion for the understanding of

[5] James Hathaway, *The Law of Refugee Status* (Canada: Butterworths Law, 1991), p. 221

[6] Statement of representative of Belgium, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary Record of the twenty-ninth meeting, last visited at: http://www.unhcr.org/3ae68cdf4.html [accessed 20 February 2012]

[7] James Hathaway, *The Law of Refugee Status*, p. 224

[8] UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html [accessed 20 February 2012]

this clause refers to the commission of acts such as racial discrimination or denial of the right of self-determination.

As the terms of the purposes and objective are general and vague, the UNHCR recommended careful and narrow consideration of this exclusion clause. As the Charter of the United Nations bounds States, in principle only persons in positions of power would appear capable of committing such acts[9]. Still, the discussion is left open for the cases involving a terrorist act.

From the language of the 1951 Geneva Convention, it would appear that the application of the exclusion clauses is mandatory ("the provisions shall not apply"). Commenting on the proportionality considerations, the UNHCR in its analysis, is invoking the humanitarian object and purpose of the Convention to justify the necessity of assessing the respect for human rights in the application of the exclusion clauses. In the words of the UNHCR "as with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity and acts falling under article 1F(c), as the acts covered are so heinous."[10]

Several consequences are to be drawn from the drafters' intention and the UNHCR interpretation. Firstly, although the terms of the Convention would support a mandatory application of the exclusion clauses (that is, any person having committed such acts should not recognize as a refugee), in fact, their application is subject, to a wider or narrower degree, to a proportionality test. This test would allow striking a fair balance between the seriousness of the crime and the need to see it punished and the risk the person is facing. It is to be noted that the result of the proportionality test would be either the revocation or cancellation or non-recognition of the refugee status or the maintenance or recognition of this status.

This is important to underline, because the proportionality test is similar to the one applied by the human rights organs in deciding if a measure restricting the exercise of a right represents a legitimate interference or a violation of that right. Still, its consequences in the field of refugees' protection go beyond the simple avoidance of a violation to someone's rights. A person who committed a serious non-political crime would face an inhuman punishment or an unfair trial. Two possibilities are opened to a receiving State at that point, according to the domestic practice: either to have recourse to proportionality considerations, either to consider that such a punishment or trial represents a violation of a human right so they should be dealt with from the human rights perspective. However, the consequences are not the same and therefore the two possibilities should not be seen as excluding each other, but as complementary, the second one being activated if the first one would lead to the exclusion from being a refugee. As to the consequences, the application of proportionality considerations would result in the maintenance of the refugee status, with all the rights it confers and with the guarantee of *non-refoulement* that is more protective that that prohibition to return under human rights law. In fact, in refugee law, the existence of a threat to the life or freedom of a person on account of race, religion, nationality, political opinion or membership to a particular social group is prohibiting any measure of expulsion or return: under human rights law, the individual must prove a real risk and concrete risk of being subjected to ill treatment[11].

[9] UN High Commissioner for Refugees, Guidelines on International protection: Application of the Exclusion clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 september 2005, p. 5 available at: http://www.unhcr.org/refworld/docid/3f5857684.html [accessed 20 February 2012]

[10] UN High Commissioner for Refugees, Guidelines on International protection: Application of the Exclusion clauses, p. 7

[11] European Court of Human Rights – Press Unit, Factsheet - Expulsions and Extraditions, January 2012, available at http://www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Expulsions_and_extradition_EN.pdf [accessed 19 February 2012]

The automatic exclusion, on the ground that the person is protected under human rights law, would simply mean the prohibition to expel or return, without any particular statue being afforded to that person; besides, the threshold of proof is higher that refugees' *non-refoulement*. Only a probability of individual application would stay the execution of the return measure.

Secondly, in general the test would apply only in connection with the perpetration of serious non-political crimes; still, although normally excluded from the application in the other hypothesis, the test is not completely ignored; in some extraordinary cases, the UNHCR applied the test even when crimes against humanity were committed[12]. We consider that this application is justified by the fact that the status determination officer and even the domestic courts dealing with the exclusion clauses are not criminal tribunal and their evaluation does not attain the strictness of a criminal procedure. It follows that the individual would be found "guilty" outside the normal guarantees of a penal procedure.

Thirdly, it is not definitively agreed as to the qualification of the terrorist acts, if they would fall under the "serious non-political crime" notion or the "acts contrary to the purposes and objectives of the United Nations" one. Still, the UNHCR seems to favor inclusion in the first category, as the methods and consequences are those of a serious non-political crime. This position is also more favorable to the individual, as in general, the perpetration of a serious non political crime is proved by the initiation of criminal proceedings, documents and evidence collected in the file, prosecution applications, and judicial decisions. A conclusion as to whether a person "is guilty" for an act contrary to the purposes and objectives of the United Nations, if that act is not at the same time a crime, is more difficult and the evaluation of individual responsibility, that does not benefit from the criminal standard, more fluid.

The judgment of the European Court of Justice

In responding to the questions referred by the German Federal Administrative Court, the European instance considered, in the first place, the qualification to be given to terrorist acts; it concluded that those acts could fall to be regarded both as serious non political crimes and as acts contrary to the purposes and objectives of the United Nations. Still, as the language employed both by the Geneva Convention and the Directive 2004/83 shows, it is not sufficient that the organization to whom the person belongs had perpetrated such acts; it must be shown that the acts were committed by the person in question. Recalling the principle of individual responsibility, the European Court underlined that "the mere fact that the person concerned was a member of such an organization cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions"[13].

By way of consequence, although the domestic court provoked the re-qualification of the acts reproached to the applicants, the European instance refrained from making a choice; it is to be noted that this abstention from the European Court in not without consequences – as the first applicant had committed both acts as member of a terrorist organization but also murder. From the factual background, it follows that neither the domestic nor the European courts were interested with the second potential „serious non political crime", only with the acts committed while a member of the organization.

At the same time, the European Court's directions as to the assessment of the individual responsibility, without clarifying the notion she is dealing with (non political crime or act contrary to the purposes and objective of the United Nations), would imply that the same standard of proof

[12] UN High Commissioner for Refugees, *Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers*, 12 September 2005, available at: http://www.unhcr.org/refworld/docid/440eda694.html [accessed 19 February 2012]

[13] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 88

applies for serious crimes that are generally discovered upon extradition requests (that is, a criminal proceeding is ongoing or has been completed) and for the other acts. Although this could be regarded as a guarantee and applauded as such and we genuinely acknowledge its importance, it is worrying however that a person is evaluated as being "guilty" in the absence of specific guarantees and a specific procedure[14].

However, the European Court, in answering the third question, considered that, once the domestic authority or court has determined that the person in question has committed a crime so falling under the exclusion clauses, their effect is mandatory and the person is excluded from being a refugee.

The Court considered that no proportionality test is required, as the domestic instance has already, „in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person"[15]. But a few paragraphs earlier, when indicating the elements to be taken into consideration, the Court only remembered: the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct[16]. The indication is correct as it only takes into account the demarche to determine whether the acts committed by the organization concerned meet the conditions laid down in exclusion provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned.

Still, the proportionality test, that the Court obviates, is not reduced to just assessing the role or the subjective state of mind of the person concerned and is applied after the qualification of an act as serious non political crime or act contrary to the purposes and objectives of the United Nations. Among proportionality considerations one should take into account the period of time elapsed from the perpetration of facts, the punishment already completed, the age of the perpetrator at the moment of the fact, the fairness of the trial. By using these tools, even if one is in the presence of a serious non-political crime of an act contrary to the purposes and objectives of the United Nations, could decide, after balancing different interests, not o exclude the person concerned from being a refugee.

The European Court is very firm in its position; the commission of a crime – against peace or humanity, war crime, non political one, contrary to the purposes of the United Nations – renders the perpetrator not worthy of the protection deriving from the refugee status. It is another way of proclaiming that refugee protection is for a person that is being persecuted, that suffering from a harm that is being illegitimately, maliciously and unjustifiably inflicted. The fact that a person is guilty of serious or - as the UNHCR put it - heinous acts, transforms him or her into an individual undeserving of protection. It is a clear vision of the refugee protection through asylum as a political instrument. In general terms, a political vision on asylum is concentrated on reaction for the protection of the persecuted (understood as persons chassed out of their political communities) but also for the chastising of the persecutory state for its conduct.

From the fact that the European Court did not qualified the acts described in the present cases, it follows that its position is one of principle; irrespective of the type of crime, the person considered to be guilty is to be excluded from being a refugee. This is in line with the political view on refugee status; the moment a person, although persecuted or fearing persecution, is, on serious grounds, considered to have committed such a crime, she is no longer or anymore in the position to invoke the risk of persecution in order to keep its status.

[14] Without entering into a lengthy discussion on the subject, it is worth noting that in the sanctions regime considering the events in the Cote d'Ivoire, some persons were listed on the visa-ban and assets freeze lists for incitement to racial hatred; should this also mean that they were to be excluded from being refugees, if the case may be? The standard of proof for the listing in restrictive measures is less strict and transparent.

[15] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 109

[16] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 97

The revocation, cancellation or refusal to recognize the refugee status as a consequence for the application of an exclusion clause does not mean however the absence of all evaluation of the risk of a violation of fundamental human rights for that person, in case the exclusion clause is accompanied by an extradition request or by a decision to remove the person from the receiving State's territory. Still, as explained in more detail bellow, the decision to stay an extradition or a return order will not imply the recognition of a certain status and the presence of the risk must be real and concrete. The Court itself recognize it in paragraph 110 of its decision: "it is important to note that the exclusion of a person from refugee … does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin".

3. Conclusions

Divorcing the concept of refugee protection through asylum from the humanitarian goals promoted by the NHCR does not, in consequence, have the meaning of refusing all protection for a person confronted with a probable violation of her rights; it only tries to delimitate the refugee status from the humanitarian protection, that is subsidiary and non-distinctive, in the sense that is not sanctioning a distinctive kind of harm – persecution.

It is too early to say if the trend emerging from this judgment will be consolidated; there some signs of interest from the part of domestic instances as well, which, by the questions referred to the European Courts, are provoking a new interpretation of the meaning of "membership of a particular social group" or a distinction among human rights violations that would or would not amount to persecution. The current intention of the European Court is also suggested by the total absence of any reference to the work or works of the UNHCR; however, it will certainly be difficult for the European Court to change the trend in a short term, as for many years the UNHCR has been the trainer of the domestic authorities, including in Europe and its lines of interpretation are just consolidating in the case-law of national bodies.

References

- European Court of Human Rights – Press Unit, *Factsheet - Expulsions and Extraditions*, (Strasbourg, 2012), http://www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Expulsions_and_extradition_EN.pdf
- Goodwin-Gill, Guy, *The refugee in international law*, (Oxford: OUP, 2007).
- Hathaway, James, *The Law of Refugee Status*. (Canada, Butterworths Law, 1991).
- Price, Mathew E., *Rethinking asylum: History, Purpose, and Limits* (Cambridge, CUP, 2009).
- UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* (Geneva, 2011), HCR/1P/4/ENG/REV. 3. http://www.unhcr.org/refworld/docid/4f33c8d92.html
- UN High Commissioner for Refugees, Guidelines on International protection: Application of the Exclusion clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05. Geneva, 2005, http://www.unhcr.org/refworld/docid/3f5857684.html
- UN High Commissioner for Refugees, Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers. Geneva, 2005, http://www.unhcr.org/refworld/docid/440eda694.html

CONSTITUTIONAL DISPOSITIONS REGARDING LEGAL LIABILITY

Marta Claudia CLIZA[*]
Elena Emilia ŞTEFAN[*]

Abstract

Along history, by way of common law or written means, the states were concerned with creating rules regarding the state bodies exercising political power at a certain given moment, as well as rules regarding the establishing and exercise of power, all these materializing in a document with fundamental value or transmitted via historical habits and traditions. In the present study, we attempt to capture the manner in which the Constitution of Romania, considered a rigid Constitution, captures the legal regime of liability. Also, the analysis will sometimes mingle with the presentation of the Constitutional Court's role in treating this subject.

Keywords: *Constitution, liability, review, decision, person injured in a legitimate right or interest.*

Introduction

We aim, in the following, to present the manner of regulating legal liability in the country's fundamental law. A rigorous approach, from the scientific point of view, determines us that, before proceeding to the analysis of the actual topic of our study, to make a presentation of the notion of Constitution and of its importance in a state.

The weight center of the paper is represented by the analysis of the senses of the legal liability expression, regulated by the Constitution.

Finally, we aim to achieve a synthesis of the conclusions drawn after the analysis performed and to try to identify the answer to the question: does legal liability have constitutional consecration or not?

Section 1. The notion of Constitution and its importance in a state

As a viewpoint was expressed in the doctrine, the Constitution is a fundamental politic document; it expresses a philosophy and an ideology[1]; it is a coded product of the political circumstances and of the social conditions existing at the moment of its writing and, in time, it becomes a system of conjectural resources.[2]

[*] Senior Lecturer, Ph.D., Faculty of Law "Nicolae Titulescu" University, Bucharest, Romania (e-mail: cliza_claudia@yahoo.com).

[*] Assistant Lecturer, Ph.D. candidate, Faculty of Law "Nicolae Titulescu", Bucharest, Romania (e-mail: stefanelena@gmail.com).

[1] Ion Deleanu, *Justiția constituțională*, (Lumina Lex Publishing House, Bucharest, 1995), p. 62.

[2] Ion Deleanu, op.cit., p. 65.

Etymologically, the word originates from the Latin noun "*constitutio"*, which means disposition, order, and in the system of law it evokes the edict signed by the emperor and whose legal force was superior to the other legal acts adopted by the public authorities of the empire.[3]

As it is known, in the world there are two types of Constitutions: common-law based and written. In Romania, the Constitution is written, the current one having been adopted in year 1991. The Constitution of year 1991 was reviewed through Law no. 429/2003 for the review of the Romanian Constitution, being published in the Official Gazette no.767/10.31.2003 by care of the Legislative Council, the names being updated and the text being re-numbered, after it was approved through the national referendum that was run in October 2003.

In the doctrine it is stated that the supreme law of any state – the Constitution is a politico-legal fundamental act, inspired by a certain political and social philosophy and adopted by the nation or in its name, in order to establish the form of state, the manner of organizing and functioning of the state powers and the relations between them, the general principles of society's legal order, as well as the citizens' rights and duties, document that is adopted and modified according to a special procedure.[4]

Of course, the principle of the supremacy of the Constitution and of the compulsory character of the law signifies the fact that, on the one hand, the supremacy of the Constitution is based on its supra-ordered position, *"at the top of the legal system pyramid, generating constitutional supralegality, applicable to this entire system*[5]".

Section 2. Constitutional dispositions regarding legal liability

Studies of legal sociology warn regarding the fact that the disillusioning of society's expectations towards the law is particularly related to liability, that law cannot exercise its influence in society, except to the extent to which it manages to identify the responsible person and to establish liability[6].

According to the provisions of art. 1 para. (5), liability has constitutional value and is expressed as such: "In Romania, the observance of the Constitution, of its supremacy and of the laws is compulsory".

The establishment of a certain form of legal liability for committing anti-social deeds depends on the will and interests of those leading the state at that moment, on the importance of the social values that must be protected, according to the evaluation given by the governed persons, for the purpose of the full protection of these values[7].

At a first lecture on the reviewed Constitution we notice that we find, in different contexts, either the word *liability*, or the word *responsibility*. At the same time, we noticed the fact that we find indications on responsibility in the form of the guarantees established in the Romanian Constitution, reviewed.

---

[3] Cristian Ionescu, *Regimuri politice contemporane*, (All Beck Publishing House, Bucharest, 2004), p.1, quoted by Verginia Vedinaş, *Drept administrativ,* 4th edition, reviewed and added, (Universul Juridic Publishing House, Bucharest, 2009), p. 47; Tudor Drăganu, *Drept constituţional,* (D.P. Publishing House, Bucharest, 1972), p. 45.

[4] Cristian Ionescu, *Contencios constituţional,* (Universul Juridic Publishing House, Bucharest, 2010), p. 18.

[5] M. Constantinescu, I. Muraru, A. Iorgovan, *Revizuirea Constituţiei, Explicaţii şi comentarii*, (Rosetti Publishing House, Bucharest, 2003), p. 6, quoted by Rozalia-Ana Lazăr, *Legalitatea actului administrativ*, (All Beck Publishing House, Bucharest, 2004), p. 7.

[6] Sofia Popescu, *Teoria Generală a Dreptului*, (Lumina Lex Publishing House, Bucharest, 2000), p. 300.

[7] V. Dongoroz and others, *Înlocuirea răspunderii penale pentru unele infracţiuni cu răspunderea administrativă sau disciplinară, (*Academiei Publishing House, Bucharest, 1975), p. 9 quoted by Dumitru Brezoianu, *Drept administrativ român*, (All Beck Publishing House, Bucharest, 2004), p. 115.

Thus, in the following we shall present in our own manner a selection of the texts we consider relevant for the topic suggested, regarding the law-making power, the executive power and aspects related to magistrates' liability.

With respect to the *law-making power*, in the Constitution, on the one hand, we find express articles regarding parliamentarians' liability and, on the other hand, from the corroboration and interpretation of other articles we deduce the type of liability.

Thus, if in art. 72 it is stipulated that *deputies and senators cannot be made legally liable for their political votes or opinions expressed in the exercise of their mandate*, which basically means the absence of liability for opinions and votes, in art. 69 it is not expressly stipulated their liability, however, it is deduced by way of interpretation, from the content of the text, namely: "*in the exercise of their mandate, deputies and senators are in the service of the people*", which means, we interpret, that they have a constitutional liability, being people's representatives.

On the other hand, with respect to immunity, paragraphs 2 and 3 of art. 72 detail regarding the criminal liability of deputies and senators. In completion of the constitutional texts, there is Law no. 7/2006 regarding the statute of the parliamentarian public servant.[8] In Chapter VI, called the disciplinary liability of parliamentarian public servants, through art.78 of this law it is established that: *parliamentarian public servants are disciplinary, contraventionally, civilly and criminally liable, in the conditions of the law*. In the doctrine it was shown that the chapter name should be corrected, in the sense in which it becomes the legal liability of the parliamentarian public servants because there is an inconsistency between the chapter name and its content, in the sense that the name refers exclusively to the disciplinary liability of the parliamentarian public servant, while in its content we find reference to the other forms of liability, as well.[9]

With respect to the executive power, first of all given the fact that in Romania we speak about a bicephalous Executive, we shall refer hereinafter to the Government, but also to the President of the country.

On the one hand, regarding the Government, there are at least two types of liability, one legal and one political.

We notice that from the analysis of art. 109 of the Constitution, called "The liability of members of Government", it derives that it has in its content provisions regarding ministerial liability, being under this aspect, we consider, slightly different in content from parliamentarians' liability. Art. 109 of the Constitution has the following wording:

"Para. (1): The Government is politically liable only before the Parliament for its entire activity. Each member of the Government is politically liable jointly with the other members for the Government activity and for its acts.

(....)

Para. (3): The cases of liability and the punishments applicable to the Government members are regulated through a law regarding ministerial liability."

The law regarding ministerial liability, to which the constitutional text refers, is Law no. 115/1999[10]. Apart from this text, the Constitution also establishes other cases of Government's political liability. On the one hand, there are the provisions of art. 112, para. (1), which stipulate that Government and each of its members have the *obligation to answer the questions or interpellations formulated by the deputies or senators* in the conditions established in the Regulations of the two

[8] Law no. 7/2006 regarding the statute of the parliamentarian public servant, published in the Official Gazette no. 35/2006, with the subsequent modifications and completions.

[9] Verginia Vedinaş, *Statutul juridic al funcţionarului public parlamentar*, (Universul Juridic Publishing House, Bucharest, 1996), p. 161.

[10] Law no. 115/1999 regarding ministerial liability, published in the Official Gazette no. 300/1999, updated with all up-to-date modifications.

Chambers of Parliament. Then, according to the provisions of art. 114 with respect to committing the Government's liability, it is understood that the *Government can commit its liability* before the Chamber of Deputies and the Senate, in joint session, on a program, a general policy statement or a law draft.

Regarding the President of the country, in the Constitution there are established two types of liability: both political and legal, regulated by art.. 95 regarding the *"suspension from office"* and art.96 regarding the *„indictment"*.

Thus, according to art. 95, the procedure for making liable for *serious deeds* through which the President is breaching the provisions of the Constitution, is started by at least 1/3 of the number of deputies and senators. The list of parliamentarians is submitted to the chamber's general secretary, and the submission date officially marks the start of the procedure to indict the President, in view of suspension[11]. The General Secretary will communicate to the President a copy of the list and the reasons for the notification, and the setting of the Chamber where the suspension proposal is officially registered is made according to the share the deputies or senators have on the list.[12]

The following stage in this procedure is to notify the Constitutional Court, in view of issuing the *consultative approval,* the President being able to come and give explanations before the Parliament, but the latter has no obligation in this sense, the constitutional text not indicating that it has such obligation. Subsequently, the Parliament debates the proposal to suspend the President afterwards, and in favour of the suspension proposal must vote the majority of the deputies and senators. The referendum for the demoting of the President is organized within at most 30 days since the vote of the Parliament and the obligation to organize it is due to the Government.

The project to review the Constitution in year 2011 proposed several changes of the text, among which with respect to the President's political liability.[13] Regarding the modification and completion of art. 95 of the Constitution, two new paragraphs were inserted, such as the text after completion was proposed to be:

(1) In case of committing serious deeds through which he/she breaches the provisions of the Constitution, the President of Romania can be suspended from office by the Parliament, with the vote of the majority of its members, after obtaining the compulsory approval of the Constitutional Court with respect to the seriousness of the deeds and the breaching of the Constitution.

(1¹) *"The continuation of the suspension procedure is conditioned by the favourable approval of the Constitutional Court. The President may give explanations to the Parliament regarding the deeds imputed to him/her.*

(1²) In case of obtaining a negative approval from the Constitutional Court, the suspension procedure will cease".

(2) The proposal of suspension from office can be initiated by at least one third of the parliamentarians' number and is immediately brought to the President's knowledge.

Also in this context, art. 146 letter h.) is also modified: "*The Constitutional Court gives mandatory approval for the proposals to suspend from office the President of Romania"*.

In conclusion, we believe, according to the draft text there are at least two novelty elements: the legal nature of the approval changes from consultative to compulsory and, on the other hand, the people cannot be consulted and, we consider, through this is breached the principle of legal symmetry. The suspension of the President will be conditioned by the favourable approval of the Constitutional Court, from which it derives that the Parliament loses its decisional power regarding

[11] Marta Claudia Cliza, *Drept administrativ. Part I,* (Universul Juridic Publishing House, Bucharest, 2011), p. 109.

[12] Idem, p. 109.

[13] http://www.presidency.ro/static/Tabel_comparativ_textul%20actual_Constitutiei-text_propus-1%20iunie%20 2011.pdf, accessed on the date of January 15, 2012.

the start of the suspension procedure, the Constitutional Court being the one to settle this matter and, practically, the weight center will move from the Parliament to the Constitutional Court in this procedure.

From our point of view, this proposal to modify art. 95 of the Constitution is not exactly appropriate, the *proposal to transform the approval from consultative in mandatory* being even not inspired, because the people are left out of this equation. Not lastly, we can consider this change as a legitimation of the President's power, the President being almost impossible to suspend under these conditions, when he/she commits serious deeds, of a nature that would make him/her susceptible of being sanctioned. The Parliament will have no decisional power in suspending the President because the initiation of such a measure can always be blocked by the negative approval of the Constitutional Court, leaving it without any legal end.

More inspired, we believe, would have been another completion to art. 95 of the Constitution, regarding the self-dissolution of the Parliament, in the case the people, consulted through referendum, would vote negatively, against the demotion proposal.

As we expressed an ample point of view, in year 2010 the Law of the Constitutional Court no.47/1992 was modified through Law no. 177/2010 for the modification and completion of Law no. 47/1992 regarding the organizing and functioning of the Constitutional Court, of the Romanian Civil Procedure Code and of the Criminal Procedure Code[14], and, at that moment, we considered this change unconstitutional, prior and contrary, to the opinion of the Constitutional Court to reject the unconstitutionality exception, which was adopted much later, in September 2010[15].

Among others, the modified text referred to the fact that the competence of the Constitutional Court was completed by consecrating its duty to give opinions on the constitutionality of the decisions of the sessions of each Chamber of the Parliament and of the decisions of the joins sessions of the two Chambers, through the modification of art. 27 para. (1) of Law no. 47/1992. We appreciate this modification of Law no. 47/1992 as being unconstitutional, behind this legislative text hiding, in fact, an attempt to review the Constitution of Romania.[16]

With respect to *criminal liability,* the procedure is established in art. 96 of the Constitution and it is triggered by the President's deed of high treason. This procedure presupposes two stages: the political stage, which takes place in the Parliament, and the legal stage, which will unfold before the criminal investigation bodies and before the court of law.

The concept of high treason, it is stated in the doctrine, is a concept of constitutional and administrative law, but it has significance also in criminal law[17]. The proposal to indict can be initiated by the majority of the deputies and senators and is brought, immediately, to the knowledge of the President of Romania, in order for him/her to be able to give explanations with respect to the deeds imputed to him/her.

The decision to indict is adopted in the joint session of the two Chambers, with a vote of 2/3 of the total number of parliamentarians. The General Prosecutor's Office attached to the High Court of Cassation and Justice is the authority that will perform the criminal investigation and will indict the President through the indictment, for committing one or several crimes established by the special

[14] Law no. 177/2010 for the modification and completion of Law no. 47/1992 regarding the organizing and functioning of the Constitutional Court, of the Romanian Civil Procedure Code and of the Criminal Procedure Code, published in the Official Gazette no. 672/ 10.04.2010.

[15] Marta Claudia Cliza, Elena Emilia Ştefan, *Amendments to law no 47/1992 regarding the organization and the functioning of the Constitutional Court-Implications regarding the dispositions of the Constitution of Romania*, Challenges of the Knowledge Society, 5th Edition, Nicolae Titulescu University, Bucharest, 15-16.05.2011**,** published in CKS -eBook, p. 765-771.

[16] Marta Claudia Cliza**,** Elena Emilia Ştefan**,** *op.cit.,* p. 765-771.

[17] Marta Claudia Cliza, *op.cit.,* p. 111.

criminal legislation. The High Court of Cassation and Justice is the one that will try the President, as first court and for the recourse.[18]

The legal civil and administrative liability[19] of the President of Romania is committed under the same conditions as foe any citizen of Romania.

Another case of liability established by the Romanian Constitution refers to *administrative liability.* Administrative liability is established by the constituent law-maker in art. 52 by means of which is regulated the right of the person injured by a public authority and represents the constitutional grounds for the liability of public authorities for the damages caused to citizens by means of breaching their legitimate rights or interests.

In the doctrine[20] it is stated that the right of a person injured by a public authority is a fundamental right, traditionally classified in the large category of guarantee-rights, together with the right to petition with which, in fact, is in close correlation.

In this sense also speaks Gheorghe Iancu[21], who considers that, in the category of jurisdictional guarantees for the protection of the citizen against public authorities, regardless of who they are, there can be included the right of the person injured by such an authority by means of an administrative act.

Paragraph 3 of art. 52 of the Constitution refers to the *state's patrimonial liability* in administrative law, text which has the following wording:

"The state is patrimonially liable for the damages caused through judicial errors. The state's liability is established in the conditions of the law and does not remove the liability of the magistrates who exercised their function with bad faith or gross negligence".

The magistrates can be made liable according to the Constitution, but Law no. 303/06.28.2004[22] regarding the statute of magistrates states the principle of civil liability and established a main patrimonial liability of the state for the damages „caused through judicial errors" and a subsidiary liability of judged.

The good administration of justice is no longer, at present, a sovereign attribute of the state, but a fundamental right of the citizens, whose accomplishment represents one of the assessment parameters regarding the democratic character of society, this being the sense indicated by the European Court of Human Rights, through the interpretation of art. 6 of the Convention, referring to what is called, in short, the right to a fair trial.[23]

Also, with the occasion of a recent study, a renowned author established that *contraventional liability* has express constitutional grounds:

- art. 44 para. (9) which consecrates a principle applicable to a sanction common to criminal and contravention liability, namely the legality of seizure of assets, but also the provision according to which only in the conditions of the law can be subjected to the sanction of seizure the assets that were destined, used or derived from crimes or misdemeanors;

---

[18] For other details, see Marta Claudia Cliza, *op.cit.,* p. 112-114.

[19] Gheorghe Iancu, *op.cit.,*p. 186-187.

[20] V. I. Prisăcaru, *Tratat de drept administrativ român, partea generală*, 2nd edition, reviewed and added (ALL Publishing House, Bucharest, 1996) p.106.

[21] Gheorghe Iancu, *op.cit*, p.133

[22] Law no. 303/ 06.28.2004 regarding the statute of magistrates, published in the Official Gazette no. 576/2004, with the last modification through Law no. 25/2012 for the modification of Law no. 303/2004 regarding the statute of judges and prosecutors and of Law no. 317/2004 regarding the Superior Council of Magistracy.

[23] Delcourt Decision of January 17, 1970, quoted by F. Ost, in Le concept de democratie dans la jurisprudence de la Cour Europeenne des Droit de l'Homme (Le journal des proces no. 124 of March 4, 1988, Brussels), p. 18, quoted by Ana Boar, *Judecătorul-putere şi răspundere,* in Revista Dreptul no. 1/1998, p. 34ş

- art. 15 para. (2) which established that the law orders only for the future, except for the more favourable criminal or contravention law.[24]

With respect to those presented, we believe that we can notice the lack of terminology unity when we analyze the significance of the notion of legal liability throughout the Constitution. The Constitutional Court stood out through an active role, giving on not many problems of law pertaining to the constitutionality of a text.

Thus, in a decision, the Court expressed itself in the sense that, regardless of the interpretations that can be made of a text, when the Constitutional Court decided that only a certain interpretation is according to the Constitution, thus maintaining the presumption of constitutionality of the text in this interpretation, both the courts of law and the administrative bodies must conform to the decision of the Court and apply it as such[25]. The power of judged matter which accompanies jurisdictional acts, hence, the decisions of the Constitutional Court, is attached not only to the order, but also to the reasons it is grounded on, states the Constitutional Court. As a consequence, indicates the Court, both the Parliament and the Government and all other public authorities and institutions are going to fully respect both the reasons and the order of this decision.

Conclusions

On the basis of the information selected and presented by us above, we established that in the text of the Constitution we do not find clearly enough the term of liability, with a precise, generally valid explanation. Thus, in the doctrine was expressed the point of view according to which the lack of terminology unity explains the absence of a general theory of legal liability, although the notion is obviously essential.[26]

On the other hand, we noticed that legal liability has constitutional consecration, being established in art. 1 of the Romanian Constitution, which, in fact, represents the answer to the question we posed at the beginning of this study.

In conclusion, we cannot refrain from declaring our agreement with the viewpoint of author Antonie Iorgovan[27] who sees in the Romanian Constitution the sense of two terms, namely *liability* and *responsibility*, which, in his opinion, are indicated as follows:

"*Liability* presupposes a relating of the City, by means of its authorities, to the agent of the social action (in fact, of the Parliament towards the Government), while *responsibility* appears as the active relating of the agent of the social action towards the City, towards its rules and authorities (in fact, of the Government towards the Parliament).

Thus, we believe we were able to fulfill the objective set at the beginning of this study, disclosing the multiple senses of liability within the text of the fundamental law.

---

[24] Corneliu Liviu Popescu, *Reglementarea constituțională a contravențiilor*, Revista de drept public no. 1-2/1996, (Atlas T&T Publishing House), p. 80-83.

[25] Decision of the *Constitutional Court* no. 536 of April 28, 2011, published in the Official gazette no. 482/07.07.2011, http://www.ccr.ro/decisions/pdf/ro/2011/D0536_11.pdf, accessed on the date of May 19, 2012.

[26] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului,* 2nd edition, (C.H. Beck Publishing House, Bucharest, 2008), p. 537.

[27] A Iorgovan, *Drept administrativ.Tratat elementar*. (Proarcadia Publishing House, Bucharest, 1993), p. 175, quoted by V. Dabu, *Răspunderea juridică a funcționarului public*, (Global Lex Publishing House, Bucharest, 2007), p. 35.

References

- Dumitru Brezoianu, *Drept administrativ român*, (All Beck Publishing House, Bucharest, 2004), p. 115.
- Ana Boar, *Judecătorul-putere şi răspundere,* în Revista Dreptul no. 1/1998, p. 34.
- M. Constantinescu, I. Muraru, A Iorgovan, *Revizuirea Constituţiei, Explicaţii şi comentarii*, (Rosetti Publishing House, Bucharest, 2003), p. 6.
- Marta Claudia Cliza, Drept administrativ. Partea I, (Universul Juridic Publishing House, Bucharest), 2011, p. 109 and the following.
- Marta Claudia Cliza**,** Elena Emilia Ştefan, *"Amendments to law no 47/1992 regarding the organization and the functioning of the Constitutional Court-Implications regarding the dispositions of the Constitution of Romania*", Challenges of the Knowledge Society, 5th Edition, Nicolae Titulescu University, Bucharest, 15-16.05.2011**,** published in CKS -eBook*,* p. 765-771.
- V. Dabu, *Răspunderea juridică a funcţionarului public*, (Global Lex Publishing House, Bucharest, 2007), p.35.
- Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului,* 2nd edition, (C.H. Beck Publishing House, Bucharest, 2008)*,* p. 537.
- Ion Deleanu, *Justiţia constituţională*, (Lumina Lex Publishing House, Bucharest, 1995), p. 62 and the following.
- V. Dongoroz and others, *Înlocuirea răspunderii penale pentru unele infracţiuni cu răspunderea administrativă sau disciplinară, (*Academiei Publishing House, Bucharest, 1975), p. 9 and the following.
- Tudor Drăganu, *Drept constituţional*, (D.P. Publishing House, Bucharest, 1972), p. 45.
- Cristian Ionescu, *Regimuri politice contemporane*, (All Beck Publishing House, Bucharest, 2004), p. 1.
- Cristian Ionescu, *Contencios constituţional,* (Universul Juridic Publishing House, Bucharest, 2010), p. 18.
- Antonie Iorgovan, *Drept administrativ.Tratat elementar*, (Proarcadia Publishing House, Bucharest, 1993), p. 175 and the following.
- Rozalia-Ana Lazăr, *Legalitatea actului administrativ*, (All Beck Publishing House, Bucharest, 2004), p. 7.
- Sofia Popescu, *Teoria Generală a Dreptului,* (Lumina Lex Publishing House, Bucharest, 2000), p. 300.
- Corneliu Liviu Popescu, *Reglementarea constituţională a contravenţiilor*, Public Law Review no. 1-2/1996, (Atlas T&T Publishing House, Bucharest), p. 80-83.
- V. I. Prisăcaru, *Tratat de drept administrativ român, partea generală*, 2nd edition, reviewed and added, (ALL Publishing House, Bucharest, 1996) p. 106 and the following.
- Verginia Vedinaş, *Statutul juridic al funcţionarului public parlamentar,* (Universul Juridic Publishing House, Bucharest, 1996), p. 161.
- Verginia Vedinaş, *Drept administrativ,* 4th edition, reviewed and added, (Universul Juridic Publishing House, Bucharest, 2009), p. 47.
- Law no. 177/2010 for the modification and completion of Law no. 47/1992 regarding the organizing and functioning of the Constitutional Court, of the Romanian Civil Procedure Code and of the Criminal Procedure Code, published in the Official Gazette no. 672/ 04.10.2010.

- Law no. 7/2006 regarding the statute of the parliamentarian public servant, published in the Official Gazette no. 35/2006, with the subsequent modifications and completions.
- Law no. 115/1999 regarding ministerial liability, published in the Official Gazette no. 300/1999, updated with all up-to-date modifications.
- Delcourt Decision of January 17, 1970, quoted by F. Ost, in *Le concept de democratie dans la jurisprudence de la Cour Europeenne des Droit de l'Homme (Le journal des proces no. 124 of March 4, 1988,* Brussels), p. 18.
- Law no. 303/ 06.28.2004 regarding the statute of magistrates, published in the Official Gazette no. 576/2004, with the last modification through Law no. 25/2012 for the modification of Law no. 303/2004 regarding the statute of judges and prosecutors and of Law no. 317/2004 regarding the Superior Council of Magistracy.
- Decision of the Constitutional Court no. 536 of April 28, 2011, published in the Official Gazette no. 482/ 07.07.2011, http://www.ccr.ro/decisions/pdf/ro/2011/D0536_11.pdf, accessed on the date of May 19, 2012.

STANDARDIZATION OF JUDICIAL PRACTICE AND HARMONIZATION WITH THE ECTHR JURISPRUDENCE IN CRIMINAL LAW. THE SPANISH CRIMINAL JUSTICE SYSTEM

Lorena BACHMAIER*

Abstract

The present paper is based on the data provided for the CKS questionnaire for the comparative study on the "Standardization of judicial practice and harmonization of the European Court of Human Rights Jurisprudence in Criminal Law" of the Nicolae Titulescu University. The report aims to give a brief overview of the Spanish legal system and specifically the way in which it provides a coherent and unified judicial practice in the criminal law field in compliance with the standards set out by the ECtHR.

Keywords: *standardization of judicial practice; European Court of Human Rights Jurisprudence; Spanish legal system; criminal law field;*

I. Introduction to the judiary: The criminal courts

In Spain there are 10.3 judges per 100.000 inhabitants. The total number of judges is 4.836. The total budget of the Court system is 3.558.073.830 euros, which represent aprox. 1% of the total budget[1].

The General Council of the Judiciary is the governing body of the judicial power[2]. Art. 122 of the Spanish Constitution establishes the composition and main competences of the General Council of the Judiciary, and precisely states that "an organic law shall set up the statutes and the system of incompatibilities applicable to its members and their functions, especially in connection with appointments, promotion, inspection and the disciplinary system". According to this constitutional rule, the organic Law of the Judiciary (Ley Orgánica del Poder Judicial) 6/1985 of 1.7.1980 regulates the functions and competences of the General Council of the Judiciary[3].

The State Council, regulated by Organic Law 3/1980, 22.4.1980, is the supreme advisory body of the State[4]. The State Council is not involved in the unification of the case law, nor does it have any competences with regard to the judiciary.

---

* Professor, Ph.D., Complutense University of Madrid (e-mail: l.bachmaier@der.ucm.es).

[1] These figures are the statistical data for 2009, published by the General Council of the Judiciary.

[2] To ensure the full separation of powers and the judicial independence, the Constitution establishes the General Council of the Judiciary (*Consejo General del Poder Judicial,* CGPJ) stated at Art.122.2 SC as the institution that will govern the judicial power. Judges are independent and bound only to the rule of law., See, L.BACHMAIER and A. DEL MORAL, *Criminal Law in Spain,* The Netherlands, 2010, p. 24.

[3] Art. 108 of the Law of the Judiciary states the draft laws which require a previous opinion of the General Council of the Judiciary, which are in general all the laws and legal provisions that are related to the judiciary, the judicial power, the staff of the courts, as well as criminal laws and those relating to the penitentiary rules. The opinion of the General Council of the Judiciary with regard to the legal reforms mentioned shall be sent to the Parliament within 30 days. The opinion of the General Council of the Judiciary has no legal binding effect.

[4] Art. 21 Organic Law 3/1980 of 22.4.1980 lists the draft laws and deeds that require to be informed by the State Council before their enactment. The reports of the State Council have no binding effect, but the laws that have been informed by the State council shall indicate if they have followed the opinion of the State Council or not.

The administration of justice is divided into four branches[5]: civil (within the civil branch there are commercial courts and family courts), criminal, labour, and administrative courts, and within each jurisdiction they are organised hierarchically. The Supreme Court is the highest judicial body in all branches of justice except the provisions concerning constitutional rights and guarantees (Art. 123.1 SC). This division allows the judges to develop over the years en expertise in legal specialities, which benefits the accuracy in adjudicating, particularly in complex cases, as well as the efficiency of the administration of justice.

Spanish territory is divided for judicial purposes into (Arts. 30 et. seq. LOPJ):

– Municipalities *(municipios)*

– Judicial Districts *(partidos judiciales)*

– Provinces *(provincias)*

– Autonomous Communities *(Comunidades Autonomas)*

This division is almost equivalent to the administrative division of the territory and it corresponds to the administrative demarcations with the same name, except the judicial districts which are a purely judicial territorial division (Art. 32 LOPJ). The judges only have jurisdiction within the territorial boundaries of their district. Every act that needs to be done outside their territorial jurisdiction will need the judicial cooperation of the competent judge.

The Constitutional Court, envisaged in Section IX of the Spanish Constitution of 1978, is the supreme interpreter of the Constitution.

The various levels of courts within each of the jurisdictional branches are empowered to hear cases depending on subject-matter rules or on the amount of the claim or seriousness of the penalty.

Within the Criminal jurisdiction there are following courts:

1) Justice of Peace *(Juzgados de Paz)* have jurisdiction in the Municipalities, but only in those where there is no Investigating Judge. They are appointed for a term of four years by the city council assembly and they are not professional judges. As to their status and functions, as criminal courts they decide only over a limited number of petty offences or misdemeanours (Arts. 99 et.seq. LOPJ and art. 14 CCP). Their subject-matter jurisdiction is very limited.

2) Investigating Judge *(Juzgados Instruccion)*. They are made up of one judge, who deals with civil as with criminal matters. In the criminal field, the judge acts as an Investigating Judge but is also competent to deal with the *habeas corpus* and with minor offences procedures (Art. 87 LOPJ).

They also act as trial courts in cases of petty offences.

3) Criminal Courts *(Juzgado de lo Penal)*, are trial courts with jurisdiction in the territory of the province. They are competent to deal in the first instance with cases where the imprisonment penalty is lower than 5 years (Art. 14.3 LECrim).

4) Provincial Courts *(Audiencia Provincial)*, whose Criminal Sections – made of three judges – deal as a first instance court with cases sanctioned with a penalty higher than five years imprisonment; in addition they act as appellate courts in respect of the sentences of the Criminal Courts within the province (Art. 80 et.seq. LOPJ). The jury trial takes place within the provincial courts; a magistrate of this court will preside over the jury trial.

5) Higher Regional Courts *(Tribunal Superior de Justicia)*. Each Autonomous Community has a High Court of Justice, which is the top of the judicial organisation of each region, without prejudice of the jurisdiction of the Supreme Court. The High Court of Justice deals as a first instance court with criminal cases in which the accused is a judge, magistrate or a public prosecutor. They also decide the appellate review of the decisions rendered by the Provincial Courts (Art. 73 LOPJ). It also has competence to decide the appeals filed against the judgment rendered in the jury trial (Art. 846 bis a) LECrim).

[5] On the judicial organization see L.BACHMAIER and A. DEL MORAL, op.cit., pp. 197 ff.

6) *National Court (Audiencia Nacional),* has jurisdiction over certain crimes with national effects. In order to avoid the difficulties arising from the necessity of coordinating the investigation of numerous Investigating Judges (whose power is limited to the territory of the judicial district) in more complex cases, in 1977 the National Court was established as a court with national jurisdiction. In the criminal field, it is competent for particularly serious offences that go beyond the borders of several provincial courts. The subject-matter jurisdiction is mainly defined in Art. 65 LOPJ, which are: counterfeiting of coins, fraud possibly affecting the national economy or with repercussions in more than one province, money-laundering, offences against the public health committed by organised groups (drug trafficking), offences against the Head of the State, and crimes committed beyond the Spanish borders, and later also terrorism.

7) Supreme Court *(Tribunal Supremo)*, which sits in Madrid is the highest judicial body, except in relation to constitutional rights. The Supreme Court is divided into five Chambers, one for each of the jurisdictional branches, plus the Military Chamber. The Criminal Chamber has nation-wide jurisdiction to decide the *appeal* and has also power to review certain sentences. It also has jurisdiction to investigate and decide criminal cases against persons that occupy high position in State institutions, as for example, the President of the government, of the Senate, the members of the General Council of the Judiciary, the President of the Constitutional Court or the Magistrates of the National Court *et al*. (Art. 57 LOPJ).

8) Other specialized courts within the criminal jurisdiction are: juvenile courts, gender violence courts and penitentiary courts. Military courts have a very limited scope of jurisdiction over criminal actions committed by members of the military within their premises or during their missions.

II. The system of sources of law and the role of the jurisprudence

1. *Overview of the sources of law*

The first title of the Spanish Civil Code that of 1889 contains the provisions relating the sources of law in the Spanish legal system[6]:

"1. The sources of the Spanish legal order are statutes (*leyes*), custom, and the general principles of law (*principios generales del derecho*).

2. Provisions that contradict those at a superior level lack validity.

3. Custom only applies where there is no applicable statute and then it must not be contrary to morals, or public policy, and it must be proven…

4. General principles of law are applicable where there is no statute or custom…

5. **Case law (*jurisprudencia*) complements the legal order with the doctrine the Supreme Court establishes, by reiteration, interpreting and applying the statutes, the custom and the general principles of law.**

7. Judges and courts have the absolute duty to decide the matters in issue in each case, abiding by the established system of sources of law."

This provision already establishes the order in which the different laws shall be applied. With regard to the sources of law and the priority of rules, the Spanish Constitution expressly states in art.9.3: „The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the

[6] For a general overview of the sources of law in the Spanish legal system see M. MARTÍNEZ SOSPEDRA, *Fuentes del derecho en el derecho español: una introducción*, Valencia 2010.

publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter."

The legal hierarchy means that certain rules cannot contradict those above them in hierarchy. On the other side the rules at a higher level in the hierarchy can override rules down in hierarchy and thus deprive them of legal effect. Thus a Regulation (*Reglamento*) cannot contradict a law, a law cannot contradict an organic law, and none of the legal provisions can contradict the constitution.

The entering into force of the Spanish Constitution determines that the International Treaties concluded by Spain and published in the legislative collection, are part of the domestic legal system. This has a particular importance since the adhesion of Spain to the European Community in 31.5.1985. Spain's adhesion includes the statement that Spain accepts without reserves the treaties and their political aims of the European Community and the primacy of Community law over those national provisions that are contrary to them. The adhesion means also that Spain accepts and is bound by the procedures to ensure uniformity of interpretation of Community Law. It is also crucial to understand the effect of the ECHR and the Standards set out by the ECtHR in the Spanish legal order: Spain ratified the European Convention of Human Rights in 1979.

As to the criminal law, Art. 25 SC recognises the principle of penal legality *(principio de legalidad penal)*, stating that "no one may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a crime, misdemeanour or administrative offence according to the law in force at that time." The question has been raised whether the legality principle requires all criminal offences to be regulated by organic law, or if an ordinary law accomplishes the constitutional requirements.[7] Art. 81 of the Spanish Constitution states:

1."Organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statutes of Autonomy and the general electoral system, and the laws provided in the Constitution. 2. The passing, amendment or repeal of the organic laws shall require an absolute majority of the members of Congress in a final vote on the bill as a whole."

This means that only the matters mentioned in Art. 81 SC shall be regulated by organic law. The problem is to define the scope of rules "relating to the development" of fundamental rights.[8] For some authors,[9] the penal law has to be an organic law as, according to Art. 81 SC, it relates directly to the development of fundamental rights. When imposing a custodial penalty one of the most important fundamental rights, namely the right to freedom is restricted and thus, in accordance with Art. 81 SC, an organic law is needed to enact these legal provisions. However, the Constitutional Court, when recognising that the restriction of every fundamental right requires an authorisation provided in an organic law, states that only when the legislator establishes custodial penalties, this kind of law is needed. In those cases where the penalty is a financial fine or another non-custodial penalty, such organic law is not needed, as no fundamental right is directly affected.[10] Neither the prosecutor nor the General Council of the Judiciary or the institutions of the Autonomous Communities may pass any criminal law. The criminal law making procedure is absolutely centralised.

[7] See J. CHOFRE SIRVENT, *Significado y función de las leyes orgánicas*, Madrid 1995, pp.134-147.

[8] On the discusión of the scope of the organic laws see J. CHOFRE SIRVENT, op. cit., pp. 102-169.

[9] See N. GARCIA RIVAS, "Los principios del derecho penal constitucional", at http://www.iustel.com; L. *ARROYO ZAPATERO*, "Principio de legalidad y reserva de ley en materia penal", *Rev. Esp. Dcho.Const.*, n. 8 (1983), pp. 24 ff.

[10] SSTC 140/1986, 11 November and 160/1986, 16 December.

2. The rules on the interpretation of legislation

The main provisions on the interpretation of laws are envisaged in the Civil Code, arts. 3 and 4.

Art. 3 CC: 1."The rules shall be construed according to the literal meaning of the words, with regard to the context, the historical and legislative precedents, the social reality of the time when they are to be applied, according mainly to their aim and spirit.

2. Equity shall be considered when applying the rules, although the judicial decisions may only be grounded on equity in those cases where the laws specifically allow it.

Art. 4 CC: "1. Analogical interpretation shall be applied in those cases where the law does not regulate a specific issue, but a similar one, with the same aim.

2. Criminal laws, exceptional laws and temporarily limited laws, shall not be applicable to different cases or times as they were enacted for.

3. The rules of this Code shall supplement the rules of other matters not included in this code."

Additionally, art.5.1 of the Judiciary Act prescribes that the judges will interpret and apply the laws according to the constitutional rules and principles, following the interpretation laid out by the Constitutional Court in all kind of proceedings.

The question if the interpretation criteria set out in the CC are also applicable for the interpretation of constitutional rules has been widely studied by the legal scholars[11]. In this respect, it has been pointed out that the evolutive interpretation —the interpretation seeking to adapt the meaning of the rule to the changing social, political and economic context— has a particular significance in the interpretation of the Constitution. The Constitution is an open text, result of the consensus of the drafters, and therefore, it is through the interpretation that its rules can adapt to new times and situations. Moreover the constitutional interpretation has to give attention to the feature of unity of the Constitution: one constitutional rule cannot be interpreted in an isolated way, but only with regard to the other constitutional provisions, as the Constitution is an integral text. But there are no legal provisions establishing special patterns or rules of interpretation of the Constitution.

3. The role of the jurisprudence

The role of the jurisprudence, as expressed in the aforementioned art. 1.5 of the Civil Code, following the traditional Napoleonic French system of sources of law plays only a secondary role, complementing the other sources of law.

At first the so called "legal doctrine" —the expression used in art. 6.5 of the Civil Code for the case-law— comprised the case-law of all courts, but its scope was narrowed down until it only applied to the case-law of the Supreme Court. For identifying the existence of "legal doctrine", there must be at least two decisions of the Supreme Court in the same sense. A breach of the jurisprudence thereafter by an inferior court can give rise to appeal by cassation to the Supreme Court (infringement of the "legal doctrine").

In order to allow the legal order to evolve and adapt to new circumstances and social needs, the judges may depart from the established case-law. But, the change of reiterated and long established case law on particular matters needs to be motivated: the judgment has to explain the reasons that justify departing from the previous interpretation and what are the grounds for adopting

[11] On this issue see generally, T. REQUENA LÓPEZ, Sobre la función, los medios y los límites de la interpretación de la Constitución, Granada 2001.

new interpretative guidelines. This function is attributed specifically to the Supreme Court and the Constitutional Court.

But, as not all the cases and legal issues have access to the Supreme Court and the Constitutional Court, the Appellate Courts also have a say in the interpretation of legal provisions. Even if the infringement of the case-law set out by a superior court may constitute a reason to quash the sentence of the lower court, it does not mean that the lower court is in all events obliged to follow the interpretation adopted by the superior courts.

Usually lower courts tend to follow the case law of the Appellate Court of their territory. However, if they consider that the previous case-law does not apply to the actual case or should be reconsidered, the judges can depart from the precedents, explaining the grounds therefore. For example, if a rule has to be reinterpreted in a different way, because there is a judgement of the ECtHR stating the way in which the law should apply, or there is a new case-law from the Constitutional Court, the lower Court, shall invoke those decisions to depart from the case-law of Appellate Courts.

In sum, the judge is free to follow the legal doctrine of the Supreme Court, but in that case he/she will face the risk of his/her decisions being upset by way of appeal or cassation. This flexibility allows the lower judges to disregard errors or outdated interpretations of the Supreme Court. By motivating the reasons why he/she does not consider the existing jurisprudence not applicable to the case. But continuous disregard of the doctrine set out by the Superior Courts, without motivation, could lead to accountability for neglecting the judicial functions.

As to the case-law of the Constitutional Court, as mentioned earlier, art. 5 of the Judiciary Act (*Ley Orgánica del Poder Judicial*) states its binding effect[12]. Each judge has to apply the laws according to the interpretation given by the Constitutional Court.

The legal doctrine of the Supreme Court and the uniform interpretation of the constitutional provisions by the Constitutional Court bring uniformity in the legal system.

4. The jurisprudence of the Strasbourg and Luxembourg Courts in the Spanish legal system

According to Article 10. 2 of the Spanish Constitution, Spanish rules have to be construed in the light of the international conventions and treaties signed and ratified by Spain and Art. 96 SC states: "Properly concluded international treaties shall form part of the domestic legal order once they have been published in Spain..."[13]

Additionally, Art.93 of the Spanish Constitution provides for the exercise of certain competences to be transferred to the European Community. This constitutional provision states:

"By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. It is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested."

The combination of arts. 93 and 96 SC allows the European Community law to be integrated into the Spanish legal system. Art. 93 guarantees compliance with treaties by the government and by

[12] Vid. J. LÓPEZ BARJA DE QUIROGA, "La vinculación de la doctrina del Tribunal Constitucional", in La casación: unificación de doctrina y descentralización. Vinculación de la doctrina del Tribunal Constitucional y vinculación de la jurisprudencia del Tribunal Supremo, Estudios de derecho Judicial, vol. 87 (2006), pp. 11-33.

[13] See L.BACHMAIER and A. DEL MORAL, op.cit., p. 49.

parliament and art. 96 states that once signed and officially published in Spain, the treaty becomes part of the internal law. With regard to the European Union the signature of the adhesion treaties by Spain entail the acceptance of a restricted sovereignty in certain areas and the acceptance of the supremacy of the European Law over the national law in those areas, as declared by the European Court of Justice. Art. 5 of the Treaty of Rome requires that national judicial bodies should apply European law instead of any contradictory national law. The national law may file a question of unconstitutionality of the domestic provision with the Constitutional Court or can by his/her own authority leave unapplied the national rule and instead give preference to the application of the Community law.

Spain is party to many treaties relevant to criminal law. International treaties have the status of a directly applicable legal rule. If the treaties contain provisions which are contrary to the Constitution, they require for their approval prior constitutional reform. The government and the parliament may ask the Constitutional Court to declare if a treaty is in conformity with the Constitution. Once the Constitutional Court declares the compatibility the treaty will be published in the legislative bulletin and become part of the legal system. Some treaties require the prior consent of Parliament to become part of the Spanish legal order. As a member of the United Nations Spain has signed the International Covenant on Civil and Political Rights (New York 1966), which became effective in Spain on 13 April 1977. Other treaties ratified by Spain are the International Convention on the Elimination of all Forms of Racial discrimination (New York 1966), the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (New York 1987), the Convention against Illicit Traffic of Narcotic Drug and Psychotropic Substances (Vienna 1988), and the International Convention for the Suppression of the Financing of Terrorism (New York 1999).

Within the Council of Europe Spain has ratified many treaties relevant to criminal law and procedure. The most relevant is, of course, the European Convention on Human Rights (Strasbourg 1950) and its amending protocols, which became effective in Spain on 4 October 1979. Important for the criminal justice are the European Convention on Extradition (Paris 1957) ; the European Convention on Mutual Assistance in Criminal Matters (Strasbourg 1959), ratified on 18 August 1982; the European Convention on the Suppression of Terrorism (Strasbourg 1977); the Convention on the Transfer of Sentenced Persons (Strasbourg 1983); the Convention on the Compensation of Victims of Violent Crimes (Strasbourg 1983); the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg 1990). Other important international conventions adopted within the Council of Europe as for instance the Criminal Law Convention on Corruption (1999), the Convention on Cybercrime (2001), the Convention on the Prevention of Terrorism (2005) or the Convention on Action against Trafficking in Human Beings have not been ratified by Spain by now (March 2008).

5. The relationship between jurisprudence and doctrine

As Merryman says, "the pre-eminence of the scholar in the civil law tradition is very old, where the Roman jurisconsult is considered to be the founder of this scholarly tradition. In the Anglo- American legal tradition although the legal scholarship may be growing, judges still exercise the most important influence in shaping the development of the legal system"[14]. This statement made for the whole civil law tradition is also applicable to the Spanish legal system, where most codes drafted during the 19th century were the work of scholars. Nowadays, government still calls on prestigious jurists to carry out the drafting of laws, and if they are not assigned the drafting itself,

[14] J.H. MERRYMAN, The civil law tradition. An introduction to the Legal Systemas of Western Europe and Latin America, Stanford, CA, 1969, 1985, p. 57.

they are usually consulted on the legal reforms. In sum, the role of the legal scholars in Spain is still very important in the progress and development of the legal system.

With regard to the question of the relationship between jurisprudence and legal science, if we are to answer it in a few words, it can be said that there is a constant inter-action. Legal scholars when researching a legal topic, they usually start analyzing the case-law on that particular issue, if there is already jurisprudence about it. The research methodology always —almost always— includes the critical analysis of the jurisprudence.

Supreme Court and Constitutional Court have rendered benchmarking decisions in many fields of the law and thus the judicial decisions are given importance within the legal research. And conversely, the judges when tackling a legal issue, they resort to the legal science. The basis of any legal study begins with the reading of the legal scholar works, textbooks and treaties on the subject. In finding the applicable law, the meaning of a legal provision and the possible interpretations, judges —if they have time and the workload allows them— they not only look at the judicial decisions, but most often also to the legal scholar work. However, it is still infrequent that a judgment makes a reference to a certain author or to a particular article or book, even if they base the decision on it. However, there are some judges that already include quotations or reference to the legal doctrine. In sum, in Spain the legal scholar work plays a significant role in the jurisprudence, even if the lack of time sometimes impair them to study the whole scientific production on a certain topic. To facilitate the access to the legal books and articles, every court has a basic library, more complete depending on the hierarchy of the court. Moreover, the General Council of the Judiciary publishes monographic volumes of the most actual and complex legal problems, where the authors are not only practitioners but also legal scholars. These books are distributed to all courts throughout the Spanish territory. In addition, several databases allow on-line access to scientific articles published in different legal periodicals. Although the data bases are more and more comprehensive, in Spain we still do not have a research tool like Hein-online.

The Constitutional Court and the Supreme Court not only have very complete libraries and wide access via internet to many scientific reviews, but they have a good number of high qualified judicial clerks (*Letrados*), that undoubtedly study all the relevant publications before drafting a decision. It must be bore in mind that several of these judicial clerks of the Constitutional Court, are themselves first rank University Professors.

6. The influences of globalisation on the Spanish jurisprudence

The whole legal system is influenced by the globalisation. The expansion of internet[15], the growth of trans-national commercial exchange as well as the appearance of new forms of trans-national criminality have clearly influenced many legislative instruments regarding the substantive and the procedural law. Legal orders are not immune to the globalisation process and the convergence of legal systems is visible, particularly in the field of human rights[16]. Apart from the obvious globalisation of laws and the inter-action and mutual influence of the Constitutional Courts of different states, it is not easy to identify how the Spanish jurisprudence has been influenced by comparative law or international legal trends. The clearest influence derives from the case-law of the ECtHR. As the judicial clerks and judges of the ECtHR, when studying a case which requires an innovative approach, often have a look at the solutions given by other Supreme Courts or International Courts —precisely from the US Supreme Court, the Australian Courts or the German

[15] See U. SIEBER, "Rechtliche Ordnung in einer globalen Welt", in *Rechtstheorie* 41 (2010), pp. 151-198, p. 153; A. ESER, "Internet y el derecho penal internacional", in *Hacia un derecho penal mundial,* Granada 2009, pp. 73 ff.

[16] On the debate about global law, economy and Human Rights, see the interesting reflections of M. DELMAS-MARTY, *Global Law*, New York, 2003, pp. 10 ff.

Constitutional Court—, we could affirm that its decisions are not devoid of the influence of globalisation. The case-law of the ECtHR is present in the Spanish jurisprudence, thus the globalisation has a clear influence, at least through this path, in the Spanish jurisprudence.

Apart from this, it is at odds that Spanish courts when deciding a case refer to comparative law or quote decisions of foreign courts. Constitutional Court and Supreme Court in single cases acknowledge the solutions followed in other legal systems or foreign courts. For example, in the Constitutional Court jurisprudence regarding the exclusionary rules of evidence in the criminal procedure, the influence of the U.S. Supreme Court is undeniable.

III. Appeal, cassation and other remedies

If we focus on criminal matters, the judgments given in first instance can be challenged by way of appeal to a higher court. The decisions rendered by the Court of Appeal can, in some cases, be challenged by way of cassation before the Supreme Court. Precisely,

the judgments rendered by the Justice of Peace will be appealed before the Investigating Judge, the judgments of the Investigating Judge before the Criminal Court, the ones of the Criminal Court before the Provincial Appellate Court and those rendered in first instance by the Provincial Appellate Court can, at the present, only be challenged by way of cassation before the Supreme Court.

Not all the decisions and judgements given in criminal proceedings can be challenged at the Supreme Court. The judgements rendered within the petty offence proceedings that are attributed either to the Justice of the Peace or to the Investigating Judge, have no access to cassation. Art. 847 CCP expressly states which decisions may be subject to appeal by cassation, and generally only sentences rendered by the Superior Courts of Justice or the Appellate Provincial Courts can be reviewed by way of cassation.

Furthermore, once the judicial remedies are exhausted, the parties to the proceedings may lodge a constitutional appeal grounded on the infringement of a constitutional rule. However, the access to the Constitutional Court since the reform approved in 2007, is very much restricted: in practice the admission of a Constitutional appeal is subject to the assessment made by the Court on the constitutional relevance of the case[17], and this amounts almost to a discretionary admission system.

Appellate review. The regulation of the appeal is not uniform, as there are special provisions for each type of proceedings and due to the overlapping reforms that have taken place the last decades, the regulation is much more confusing than it should be.[18] The CCP of 1881 provides that the judgments rendered by the provincial court (within the ordinary proceedings for serious offences) can only be reviewed by way of cassation and not by ordinary appeal. It must be noted that the appeal by way of cassation can be filed only to challenge legal issues, but not factual issues

The appellate review is not limited to the negative control of the sentence rendered in the instance, but it allows the appeal court to render a new decision over the issues at stake. The appellate review can be grounded firstly on the infringement of procedural rules that have caused a violation of the right to a fair process. And second, it can be founded on the violation of substantive rules or an

[17] Vid. L. BACHMAIER, "La reforma del recurso de amparo en la Ley Orgánica 6/2007, de 24 de mayo", *La Ley*, 10.9.2007 (nº 6775), pp. 1-5.

[18] On this issue see A. DEL MORAL, R. ESCOBAR and J. MORENO, *Los recursos en el proceso penal abreviado*, Granada 1999, pp. 142 ff.; M.P CALDERÓN CUADRADO, *La segunda instancia penal*, Navarra, 2005.

error in the evaluation of the evidence. These are the different grounds mentioned in Art. 790 CCP, but in practice it does not mean that the grounds for appeal are legally limited: by way of appeal the appellant may state violation of procedural rules, request to review the factual conclusions reached by the instance court or ask for a new evaluation of the evidence. Notwithstanding the broad scope of the appellate review and the possibility of a new evaluation of the facts, the evidence already practiced before the trial court will not be repeated before the appellate court (Art. 790.3 CCP). In the appellate proceedings evidence will only be practiced in following cases: 1) evidence that could not be practiced in the first instance, because it was not known or it was produced in a later moment; 2) evidence that was proposed by the parties but, without legal justification, was not admitted by the trial court; and 3) evidence was proposed and admitted by the trial court, but due to any kind of grounds, could finally not been practiced.

There is no „prejudicial appeal" (according to the Luxembourg Court pattern) regulated in the Spanish legal system, although the question of constitutionality resembles the pattern of the European prejudicial appeal, as it will be explained later.

Another issue is related to the right to appeal[19]. Pursuant art.14.5 International Covenant on Civil and Political Rights of 1966: "5. Every one convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Spanish laws are bound by this provision, thus, even if the CCP does not expressly recognized the right to a "double instance", the Spanish Constitutional Court and the Supreme Court, have declared that this is a fundamental right applicable to the criminal justice system. Problems have arisen, however, with regard to the meaning of this right to have the conviction judgment reviewed. The Supreme Court,[20] the Constitutional Court[21] and the European Court of Human Rights[22] have established that the right to two instances does not inevitably imply the need for a system of appeals in which an ordinary appeal is granted in every case. It would be enough to have the opportunity to challenge the conviction with a superior court, not necessarily by way of ordinary appeal. In sum, appeal by cassation would, according to the Spanish Constitutional Court suffice to comply with the requirements of art. 14.5 UN International Covenant on Civil and Political Rights.

Cassation. The appeal by way of cassation[23] (*recurso de casación*) may be lodged against the decisions of courts of appeal, e.g., the sentences of the Provincial Courts or the Criminal Chamber of the National Court, when acting as appellate courts. But, as already mentioned, cassation may also be filed against the judgments rendered by the Provincial Courts as trial courts, the judgments of the Superior Courts of Justice and all other final decisions of these courts (Arts. 847 y 848 CCP).

The appeal in cassation was generally introduced in the Spanish legal system in 1870 with two main objectives: to control the application of the statutory law by the lower courts; and to reach a uniform doctrine when construing the legal rules. But these two aims should be achieved while promoting the adequate protection of the parties' rights within the criminal procedure (protection of the *ius litigatoris*). Later, the protection of the fundamental rights recognized in the Constitution was added as an objective of the appeal in cassation (Art. 5.4 Judiciary Act).

---

[19] See generally, A. DEL MORAL, R. ESCOBAR and J. MORENO, *op.ult.cit*., pp.126 ff.

[20] For example, STS of 8 February and STS 27 March 2000; and STS 4 December 2000, which was preceded by a Non-Jurisdictional Agreement of the Second Chamber of the TS (dated 13 September 2000) in which the issue was discussed after learning of the opinion of the UN Committee, expressed in the first of the Communications referred to above.

[21] STC 80/1992 of 28 May, STC 113/1992 of 14 September, STC 29/1993 of 25 January, STC 120/1999 of 28 June, STC 70/2003 of 3 April, STC 80/2003 of 28 April and STC 116/2006 of 24 April.

[22] Dismissing decisions of 18 January 2000 - *Pesti and Frodl* case, 30 May 2000 – *Loewenguth* case, and 22 June 2000 –*Deperrois* case.

[23] On the cassation in criminal proceedings, see generally J.M. LUZÓN CUESTA, *El recurso de casación penal*, Madrid 2000.

Cassation in the interest of law is not admissible within the criminal procedure. The cassation is always linked to the protection of the rights of the parties to the proceedings (protection of the *ius litigatoris*). There is no cassation grounded exclusively in providing coherence to the legal system without affecting the particular rights of the parties in the relevant criminal proceedings. Cassation in the interest of law is regulated within the civil procedure (arts. 490-493 Code of Civil Procedure), to provide for uniformity of procedural rules. Those who have standing to lodge cassation in the interest of the law are: the Public Prosecutor, the Ombudsman and certain public agencies that show a special interest in the issue at stake. The cassation in the interest of law shall be filed within one year since the last judgment that applies the controversial procedural rule.

The competence of the Spanish Supreme Court within the criminal jurisdiction is regulated in art.57 of the Judiciary Act. The appeal by cassation will be decided by the Supreme Court (Second Chamber) made of a panel of three or five judges. The grounds for appeal by cassation are legally limited. Cassation can be grounded on:

a) an infringement of substantive criminal law;

b) error in the assessment of documental evidence. The Supreme Court under this paragraph can control the existence of sufficient evidence and if in the assessment of the evidentiary value of documents, the rules of logic, experience and accepted and scientific evidence have been respected or conversely have been manifestly disregarded. To quash a sentence on this ground there must have been documentary evidence timely produced, the document must show the erroneous evaluation made by the judge, or be evident that the document has not been taking into account when adjudicating, and third, that the evidentiary value of the document has not been contradicted by another evidence;

c) violation of a procedural rule. Specifically art. 850 CCP mentions as grounds for cassation based on procedural rules, the following: 1) the denial to present and practice evidence timely announced. To accept this appeal by cassation it is required that the evidence has been not only duly announced, but it must also be appropriate and admissible evidence. 2) when any of the parties have not been legally summoned to appear at trial; 3) when the court without sufficient grounds refuses to allow a witness to answer to adequate questions, and the witness deposition may be relevant for the outcome of the proceedings. 4) when a question has been rejected on the grounds that it was tricky, and in fact it is not; 5) if the trial is not suspended existing legal causes to halt it in order to safeguard the right of defence of any of the defendants. 6) if the rules on sentencing have been infringed (851 CCP).

Review of sentences. The Supreme Court has also competence to decide on the special remedy or appeal by review. The appeal by review (revision) is an extraordinary remedy based upon reasons of justice against a sentence which is *res iudicata*. The appeal by review, differently from the ordinary remedies is not aimed at precluding the judgment from being final but rather to quash a judgment that has already gained *res iudicata* effect. This extraordinary remedy aims to have a sentence annulled when there are substantial reasons of justice that must prevail over the application of the normal criteria of legal security that govern *res iudicata*.[24] Only final conviction sentences — and not other types of judicial decisions— are susceptible of revision (Art. 954 CCP). Contrary to what occurs in other legal systems, in Spain the appeal by review can be exercised only in favour of the defendant and therefore is not available against acquittal sentences.

The competent court is the Criminal Chamber of the Supreme Court, which can decide on these reviews exclusively in the specific cases listed in Art. 954 CCP: 1) when there are two contradictory sentences convicting two persons for the same crime when that crime could have only been committed by one single person; 2) when the conviction was based upon the death of someone

[24] See STC 124/1984, 18 December.

who later is proved to be alive (this is a very rare case in practice); 3) when the conviction judgment was the direct result of a criminal behaviour —e.g. if the ground for the sentence was a document that was later declared false in a judicial process; 4) when new facts or new evidence, which were unknown and could not be taken into account in the conviction sentence, may prove the defendant's innocence. The latter cause for appeal by review is the one most often alleged in practice. It has been discussed, in this respect, whether a change in the case law of the courts can be considered a "new fact" that constitutes a valid ground for the revision of a sentence with effect of *res iudicata*. The question has been controversial, and tackled in contradictory ways by the two highest Spanish courts. A decision of the Constitutional Court in 1997 provided an affirmative answer, in those cases in which the change in the case law led to the decriminalization of the conduct on which the sentence was based, but the Supreme Court held the contrary opinion two years later —in a decision (*acuerdo*) of 30 April 1999[25].

IV. The constitutional review

There is no annulment of criminal laws or other legal provisions in the Spanish legal system. The judge who considers that a law enacted after the entry in force of the Constitution is contrary to it, he/she shall lodge the question of unconstitutionality and suspend the adjudication of the case until he/she gets a decision from the Constitutional Court. The decisions on questions of unconstitutionality have *erga omnes* effect, and thus every judge is bound to follow that decision. When deciding a case, the judge considers that a legal provision that is previous to the entry into force of the Constitution is contrary to it, he/she shall not apply it, on the grounds of unconstitutionality, without being obliged to raise the question of unconstitutionality. This interpretation of the single judge has only effect to the single case he/she is deciding on.

Following rules of the Organic Law of the Constitutional Court regulate the constitutional review in the Spanish legal system:

Article 27

1. Through the procedures for a declaration of unconstitutionality established in this title, the Constitutional Court guarantees the primacy of the Constitution and determines the conformity or non-conformity therewith of contested laws, provisions or enactments.

2. A declaration of unconstitutionality may be issued in respect of the following:

a) Statutes of Autonomy and other organic laws.

b) Other State laws, regulations and enactments having the force of law.

In the case of legislative decrees (*decretos legislativos*), the Court's jurisdiction shall be exercised without prejudice to the provisions of Article 82, number 6, of the Constitution.

c) International treaties.

d) Rules of Procedure of the Houses and the Spanish Parliament (*Cortes Generales*).

e) Laws, enactments and regulations having the force of law of the Autonomous Communities, subject to the same reservation as under sub-paragraph b above with respect to cases of legislative delegation.

f) Rules of Procedure of the legislative Assemblies of the Autonomous Communities.

Article 28

[25] J.A. TOMÉ GARCÍA, (et al.), *Derecho Procesal Penal*, Madrid 2007, pp. 631-632.

1. In order to determine the conformity or non-conformity with the Constitution of a law, regulation or enactment having the force of law issued by the State or the Autonomous Communities, the Court shall consider, in addition to constitutional precepts, any laws enacted within the framework of the Constitution for the purpose of delimiting the powers of the State and the individual Autonomous Communities or of regulating or harmonizing the exercise of their powers.

2. Furthermore, the Court may declare unconstitutional, on grounds of infringement of Article 81 of the Constitution, the provisions of a decreelaw, a legislative decree, or a law other than an organic law or an enactment of an Autonomous Community, where such provisions regulate matters reserved for an organic law or require an amendment to, or a derogation from such an law, irrespective of its content.

Article 29

1. A declaration of unconstitutionality may be issued in response to:

a) an action of unconstitutionality (*recurso de inconstitucionalidad*);

b) a question of unconstitutionality (*cuestión de inconstitucionalidad*) raised by judges or law courts.

2. The dismissal, on grounds of form, of an action of unconstitutionality against a law, regulation or enactment having the force of law, shall not impede the raising of a question of unconstitutionality with respect to such law, regulation or enactment in other legal proceedings.

Article 30

The *admission* of an action or question of unconstitutionality shall not suspend the entry into force or the enforcement of the relevant law, regulation or enactment having the force of law save where the Government invokes the provisions of Article 161.2 of the Constitution to challenge, through its President, laws, regulations or enactments having the force of law of the Autonomous Communities.

Action of unconstitutionality

Article 31

An action of unconstitutionality against laws, regulations or enactments having the force of law may be brought from the date of their official publication.

Article 32

1. The following have standing to bring an action of unconstitutionality against Statutes of Autonomy and other State laws, organic or of any character whatsoever, against regulations and enactments of the State or Autonomous Communities having the force of law, and against international treaties and the Rules of Procedure of the Houses and the Spanish Parliament (*Cortes Generales*):

a) the President of the Government;

b) the Ombudsperson (*Defensor del Pueblo*);

c) fifty Deputies;

d) fifty Senators.

2. The executive collegiate bodies and the Assemblies of the Autonomous Communities, following prior agreement to that effect, shall also have standing to bring an action of unconstitutionality against State laws, provisions or enactments having the force of law that may affect their own area of autonomy.

Question of unconstitutionality raised by judges and courts

Article 35

1. Where a judge or a court, *proprio motu* or at the request of a party, considers that an enactment having the force of law which is applicable to a case and on which the validity of the ruling depends may be contrary to the Constitution, the judge or court shall raise the question before the Constitutional Court in accordance with the provisions of this Law.

2. The judicial body may raise the question only on completion of the proceedings and within the prescribed deadline for delivering its judgement, or the appropriate judicial resolution, by specifying the law or enactment having the force of law whose constitutionality is contested and the constitutional precept that is deemed to have been violated, and by indicating with supporting evidence the extent to which the judgement emanating from the proceedings depends on the validity of the enactment in question. Before delivering its final judgement, the judicial body shall hear the parties and the Public Prosecutor Office so that, within a joint deadline of ten days that may not be extended, they can put forward such arguments as they see fit regarding the appropriateness of raising a question of unconstitutionality, or on its content, whereupon the judge shall give a ruling without further process within three days. That ruling may not be appealed. However, the question of unconstitutionality may be raised again at successive stages of the proceedings or in higher courts until such time as a judgement not subject to appeal has been delivered12.

3. The raise of the question of constitutionality shall cause the temporary suspension of the proceedings on judicial procedure until the Constitutional Court decides on its admission.

Article 36

The judicial body shall lay the question of unconstitutionality before the Constitutional Court together with a certification of the records in the main proceedings and the arguments provided for in the previous article, where they exist.

V. Other mechanisms for unifying the jurisprudence

1. Data bases regarding legal decisions

The access to the courts decisions, before electronic and internet data bases were implemented, was provided through the publication of the judicial decisions in the collection of jurisprudence. All the Supreme Court decisions could be read on paper in the so called "Aranzadi collection", and the most important judgments given by the Appellate courts were also accessible in those collections through a very well structured index (by date, type of court, matter, and legal provision).

The access to the jurisprudence has been enormously facilitated since comprehensive data bases are in place. There are different data-bases —private and official—, that provide easy and swift access to the judicial decisions. The Judicial Centre of Documentation (CENDOJ) publishes the most relevant judgments and its access is free. The web page of the Constitutional Court includes a link where all the constitutional decisions are accessible through a very efficient searcher, also for free. There are also various data-bases that every practitioner is familiar with: WestLaw, LaLey, Iustel, El Derecho among others.

There is no legal provision that imposes the obligation to publish or post on a website all the court decisions. This obligation applies legally only to the Supreme Court decisions, which have to be published. But, there is no equivalent provision with regard to the decisions of first instance courts. However, the data bases include the most important decisions of these courts too.

If there is a divergent application or interpretation of the law within different courts of first instance it will become known by way of appeal or cassation.

Every court has on-line access to the data-bases containing all the legislation, the case-law of the Constitutional Court, Supreme Court and Appellate Courts. Some decisions of the lower courts which are controversial or benchmarking decisions, are also to be found in the data bases. Furthermore, there is also on-line access to the ECtHR's decisions via HUDOC, in French and in English. The courts are informed of the decisions rendered by the ECtHR affecting directly to the Spanish State.

Constitutional Court and Supreme Court have a body of highly qualified legal assistants (*Letrados*), that support the decision making body in defining the applicable law, the case-law and in drafting the sentences.

2. Judicial training

Spanish judges are mainly professional, selected on the basis of highly competitive examinations and are appointed for their lifetime. They may only be removed, suspended, transferred or retired on the grounds and subject to the safeguards provided for by the law (Art. 117.2 SC y 379 LOPJ). Once the examination procedure has ended, the candidates selected will undergo a 12 month up to 18 month training in the judicial school that sits in Barcelona.

Training in the judicial school was initially planned to last two years, but finally this period was reduced in order to allow the newly appointed judges to take hold of their destiny. The judicial school is organized by the General Council of the Judiciary (art.307 Organic Law on the Judiciary, OLJ). The training program is designed by the General Council of the Judiciary body that also selects the faculties that teach in the judicial school. It aims to give integral, specialized and high quality formation to the judges. The law expressly states that the selection and training process will respect the principle of equality and the prohibition of gender discrimination (art. 310 OLJ) While at the judicial school the candidates are already considered civil servants and are paid a salary as judges under training. The initial training period consists of full-time attendance of courses, lectures, seminars and workshops and case-study practices. The candidates are required to elaborate decisions, solve legal problems, draft sentences and prepare papers on particular topics. During the second period, the training is done directly at a court as "assistant judges" (art. 307.II OLJ). The failure to pass the evaluations during the training programme would result in the need to take the course again (art. 309 OLJ). If a candidate fails for a second time, he/she will be excluded from entering the judicial career. (art. 309.2 OLJ) However, this possibility is rather theoretical, as we do not know of any case where this situation has happened. At the end of the training program the grading of the students is taken into account together with the score obtained in the selection exam, to elaborate the ranking list of the newly recruited judges (art. 308 OLJ).

The judicial school is in charge of the initial training as well as the continuous training of judges. Art. 433 OLJ expressly grants the judges the right to receive continuous training throughout their entire judicial career. The General Council of the Judiciary every two years will approve a continuous training programme, specifying the aims, contents and priorities. Specifically the OLJ states that every year there shall be a course specialized in the judicial protection of the principle of equality between men and women (art. 433.5 OLJ).

VI. Concluding remarks

No system can reach perfection with regard to uniformity in the application and interpretation of the laws. There will always be divergences in the judicial process. The independence of every judge while deciding on a case, where he/she is only bound by the rule of law, gives the judges certain leeway in departing from previously established interpretations. Judges are also confronted with new legal problems where there is no precedent or guideline defined by superior courts that can be followed. So, it is not unusual that different lower courts and even different appellate courts give a diverse answers to the same o similar legal questions.

One of the functions of the Supreme Court is to eliminate those discrepancies and set up a uniform interpretation. However, this mechanism does not run without problems. First, it may take certain time until the Supreme Court has the chance to decide on a legal issue where the doctrine of the appellate courts appears to be divergent. Second, as there are several Sections within the five Chambers of the Supreme Court, sometimes there might also appear contradictory interpretations within the Supreme Court.

The complexity of the legal system, the heavy workload of the judges and the time pressure, sometimes causes that the judges oversee the case-law of superior courts or are not aware of the most recent sentences given by the Constitutional Court. The parties to the case and good lawyers play an important role in that sense, as in their defence statements they can invoke the case-law they deem to be applicable to the case.

Despite the existing mechanisms for providing legal uniformity, there are areas of the law where there is still uncertainty as to which is the correct interpretation of the law. It is difficult to make an assessment on how wide this phenomenon is extended. I would not judge it as a severe general problem that poses risks for the coherence of the legal system, but undoubtedly every system can be improved in this sense.

Finally, we were asked to make an assessment on the question of to what extent is the judge responsible for the violation of the laws in a country. This question is too broad to be answered in a questionnaire or in a short written report. To what extent the judiciary can be responsible for the infringements of the law is a question that requires a deep analysis and research of manifold factors, sociological, cultural, geographical, historical psychological, philosophical and criminological. Such an analysis is clearly beyond the objective of this short overview of the Spanish legal system and the mechanisms to provide coherence and unified judicial practice. However we can affirm that in Spain there is no corruption within the judiciary. There might be isolated cases of malpractice or neglect in the performance of their duties, and single disciplinary proceedings. But these are the exception.

The main problem of the judiciary is the existence of important delays in many jurisdictions and the lack of enough resources to make it work more efficiently. In the criminal jurisdiction there is no extended perception of impunity, and where this perception exists it is mainly due to the shortcomings in some legal provisions, but not in the defective functioning of the judiciary. The prosecution and sanctioning of complex economic criminality poses new challenges for the judiciary as there are more resources and special training needed to cope with these complex forms of criminality. The Spanish judicial practice complies adequately with the ECHR requirements and follows closely the ECtHR case-law, largely due to the excellent job done by the Constitutional Court in controlling the respect for Human Rights, particularly visible in the criminal jurisdiction.

THE DEVELOPMENT OF THE REGULATIONS ON GENDER BASED VIOLENCE IN ROMANIA AND SPAIN

Lavinia Mihaela VLĂDILĂ*

Abstract

In this article, I will present the evolution of the regulation of gender based violence in Romania and Spain. This new theme is one of actuality, due to the situations that frequently happen in our social life. Both Romania and Spain have a high level of gender based violence, even if nowadays in our country are few statistics on this matter. But also, both countries now enjoy good legislations, which have been developed in the last 10 years.

Keywords: *gender based violence, evolution, crime, family, legal protection*

Introduction

The present study aims to present the evolution of the regulation of gender based family violence, by comparison between Romania and Spain in the last decades. It is a general analysis of the phenomenon, without emphasizing a certain aspect of this large area.

The importance of this approach lies in the very existence of the phenomenon.

Though it is widely spread and with an ancient existence, in Romania the number of official statistics on gender based violence is nearly inexistent. In our country, family violence has "generously cohabited" with our ignorance and the acceptation of the great majority of population. Based on the principle that "*beating is torn of heaven*" it often had serious forms of violence, representing only means of an inhuman expression of frustrations, dissatisfaction and lack of personal control. This is why the ignorance of this phenomenon lasted until, taken out to the surface, it managed to generate a mass effect which subsequently determined various legislative projects, in total agreement with different European and international regulations. In Romania there is a law[1] which directly regulates gender based violence and other ones which are indirectly linked to the first one[2]. Also, in accordance with these special regulations comes the new Criminal Code of 2009, which specifically states the protection of family against any form of violence, especially domestic violence.

By comparison, in Spain, the development of the legislation went hand in hand with the expansion of various statistics in all autonomous communities, and national ones. Moreover, for the Iberian state the initiation of some staggering statistics on the existence and expansion of this

* Senior Lecturer, Ph.D., Faculty of Juridical Sciences, Socials and Politics, "Valahia" University of Târgovişte (U.V.T), Romania; Counselor of the Department of Continuing Education and Distance Learning of U.V.T, (email: laviniavladila@yahoo.com)

[1] We are talking about Law No 217/2003 on the preventing and fighting against family violence, published in the Official Gazette No 367/29.05.2003, modified by Government Emergency Ordinance No 95/2003, published in the Official Gazette No 13/8.01.2004

[2] We can consider among these *Law No 211/2004 with regard to certain steps to secure the protection of crime victims*, published in the Official Gazette No 505/4.06.2004; *Law No 272/2004 on the protection and promotion of the rights of the child*, published in the Official Gazette No 557/23.06.2004; *Law No 202/2002 on equal opportunities between women and men* republished in the Official Gazette No 150/1.03.2007; *Law No 47/2006 on social assistance* published in the Official Gazette No 239/16.03.2006

phenomenon lead to new regulations or, in other words, to special regulations in this area, being an additional reason for these statistics to develop and to lead to new regulations.

Regarding the scientific-juridical analysis of family violence, in Romania we have found several psychological, epistemological debates, but few pure juridical debates, based on the law and on jurisprudence.

In exchange, in Spain there are many juridical studies, presenting the phenomenon under all its possible aspects: historical, phenomenological, juridical, sociological etc.

To start the debate of this subject, we must state that nowadays, at the European and international level, as well as in Spain, is made the differentiation between family violence and gender based violence. Thus, family violence comprises all forms of violence within the family (physical, psychical or sexual committed with intention) against women, men, children, elder persons or against any close relative[3], while gender based violence, as defined in Spain, represents violence as the result of discrimination, inequality and of domination of men over women, exercised against the latter one by her actual or ex concubine (*the notion also includes the quality as husband*), or by the person to whom the women was or is in an affective relationship, even if they do not share a household together[4]. Therefore, our study will refer to family violence to analyze the Romanian penal framework, and both to family violence and to gender based violence to compare the Romanian[5] and Spanish situations.

This is why we strongly consider that such a comparative analysis will enrich our juridical area with new perspectives on this phenomenon.

I. International awareness of the problem – a few legislative landmarks

The awareness of the existence of a problem on family violence occurred at an international and European level at the end of the 1970s, so that in the next decade there were elaborated a series of judicial documents aiming the protection of women against domestic violence. Thus, on 26 March 1985 the Council of Europe drafted its first Recommendation R (85)4 on violence in the family[6]. Internationally, the General Assembly of the United Nations on its plenary meeting adopted Resolution 40/36 of 29 November 1985 on domestic violence[7] and Resolution 44/82 of 8 December 1989 proclaiming 1994 as International Year of the Family[8]. Another special interest for knowledge and combat of this phenomenon was expressed by the Recommendations of the World Conference of the UN held in Nairobi on 15-16 June 1985, by the Recommendations on family violence drafted by a group of experts reunited in Vienna on 8-12 December 1985 or by the Resolution 46/8 March 1993 of the Commission on Human Rights incriminating violence and violation of human rights, especially referring to women[9]. This first decade of positive reactions was followed by numerous international measures which, with the spreading of the phenomenon, aimed and determined an important involvement of the world states.

---

[3] According to Art 2 and 3 of Law No 217/2003

[4] According to Art 1 of the preliminary title of the Spanish Law 1/28 December 2004 on the measures for protection against gender based violence, published in the *Boletín Oficial del Estado* (the official Spanish state bulletin) No 313/29 December 2004 and republished with modifications in B.O.E. No 87/12 April 2005

[5] Such statement is necessary because, after the entrance into force of Law No 1/2004 also the autonomous communities have adopted their own regulations as a completion of the national law. Due to the fact that the analysis of such subject is extremely comprehensive, it cannot be the subject of our study, but remaining opened to a subsequent debate.

[6] See the official Council of Europe website http://www.coe.int/lportal/web/coe-portal

[7] See the official UN website http://www.un.org

[8] Ibid.

[9] Ortansa Brezeanu, Aura Constantinescu, *Violența domestică. Reflecții* in the Romanian Penal Law Review No 2/2007, p. 68

United Nations continued the campaign against domestic violence, so by Resolution 48/109/20 December 1993 of the General Assembly was concluded that the most familiar situations of family violence are[10]: Physical, *sexual and psychological violence occurring in the family, including battering, sexual abuse of children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation*.

Likewise, after the recommendation of 1985, the Council of Europe drafted until 2008 no less than 11 recommendations and resolutions, as well as a declaration of the Parliamentary Assembly in Vienna concerning this matter[11]. The purpose of these regulations is to offer a definition of family violence and to identify the common European feature regarding the civil or penal norms and procedures which are applicable. Also, in the past few years, were made several differences between general regulations on domestic violence and those on gender based violence, namely those which regard the violence against women in a family or sentimental framework. For instance, in the last decade, the majority of the recommendations made by the Council of Europe emphasize the violence against women, leaving aside the genera framework of the domestic violence. We most note that lat April the European Parliament debated on the incrimination of violence against women, which will be stated in a future directive. But the development of the subject on violence against women, as part of the domestic violence, must be framed in the larger area of discrimination. In the case *Opuz v Turkey* (2009) the European Court of Human Rights showed that violence against women is considered a form of discrimination which violated the European Convention on Human Rights. The situation of this type of violence, as form of discrimination, is not fully clarified and supported by enough criminal texts, but especially by criminal procedural law texts, which should be supported by financial measures. This is why the debate is still open, including for new legislative projects.

II. The evolution of the regulation in Romania

a. Stage I. General and special regulations of the Criminal Code. In Romania, family violence has been considered as a negative social phenomenon with a great delay, the first positive reactions from the legislator coming in 2000. One of the reasons of such a delay can be that in the former communist states, when *any social institution had to be integrated in the public space and subjected to exterior exigencies. On the other hand, in the communist regime, family violence was not even officially recognized as a social issue*[12], despite its existence.

Until the modifications of the Criminal Code in 2000, the protection of family was made in a general framework[13], by incriminating the offence of first degree murder against the spouse or a close relative (Art 175 Para 1 Let c) or of particularly serious murder against a pregnant murder (Art

[10] According to Art 2 of the UN Resolution 48/109/1993, available on its official website

[11] These recommendations and resolutions of the Council of Europe are: Recommendation R(85)11 on the position of the victim in the framework of criminal law and procedure, Recommendation R(87)21 on assistance to victims and the prevention of victimization, Recommendation R(90)2 on social measures concerning violence within the family, Recommendation R(91)9 on emergency measures in family matters, Recommendation R(98)1 on family mediation, Declarations and Resolutions adopted by the 3rd European Ministerial Conference on equality between men and women, organized by the Council of Europe (Rome, 1993), Recommendation R(2000)11 on the action against trafficking in human beings for the purpose of sexual exploitation, Recommendation R(2002)5 on the protection of women against violence, Recommendation R (2004)1681 on the Campaign to combat domestic violence against women in Europe, Resolution 1512(2006) "Parliaments united in combating domestic violence against women", Recommendation 1759(2006) "Parliaments united in combating domestic violence against women", Resolution R(2007)1582 of the Council of Europe "Parliaments united in combating domestic violence against women".

[12] Olivian Mastacan, *Violenţa în familia. Aspecte teoretice şi practice*, Valahia University Press, Târgovişte, 2005, p.3

[13] Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, pp. 75-76

176 Para 1 Let e). Beside these regulations, violence causing bodily harm or heath of the victim, usually woman and child, was stated by Art 180-182[14] or Art 305-306[15] of the Criminal Code. Also, until 2002, marital rape was not considered as a form of family violence, not being sanctioned[16]. Because the latter situations, except the offence of *ill treatment applied to minors*, the offences for which criminal action is initiated upon prior complaint from the injured person, the police not being able to take action, despite all kind of complaints, the violence against women and children continued unimpeded, without the state being able to interfere in an efficient way.

As it was shown above, after the adhesion of Romania to the Council of Europe[17], as well as for the future adhesion to the European area, in 2000 there were taken the first steps for the special incrimination of family violence. We can state that in 2000 were also taken the first steps for the recognition of this phenomenon as a social danger big enough as to the offences of family violence to be considered as aggravated forms of some already existing offences.

The first legislative text which brought to the attention family violence was Law No. 197/13 November 2000 which modified and completed some dispositions of the Penal Code[18]. This law modified Art 180-181 of the Penal Code, the two offences becoming aggravated when the subjects are family members. According to Art 149[1] of the Penal Code, "family member" means the spouse or the close relative, as defined by Art 149, if living and sharing a household with the perpetrator. The terms *living* and *sharing a household* were not explained by the legislator. The doctrine has appreciated that *living* refers to certain permanence in the common coexistence relationships, while the term *sharing a household* is complementary to the first and refers to the engagement of family members in the administration of their common life. The two aspects – living and sharing a household – has to be simultaneous. Just living without sharing a household, as only sharing a household without living with the perpetrator, do not fulfil the conditions of the legislative text (for instance, a close relative caring for an apartment while the owner is on vacation)[19]. From the definition of the "family member" term, results that in the Penal Code, only the offences occurring in a home are sanctioned as forms of family violence, representing a higher social danger than the other forms of family violence (we hereby refer to the offences incriminated by Art 180-181 of the Penal Code). We shall see the inconsistency resulted from the existence of two parallel regulations on family violence, with the entrance into force of Law No. 217/2003. We must add the fact that the appreciation of the "family member" statute is made in relation to the moment of the offence[20].

Returning to the regulation resulted from the modification of Art 180-181 of the Penal Code, the protection of family relationships is made in the same framework, when the hitting or other forms of violence occur against a family member (Art 180 Para 1^1 of the Penal Code), when hitting or acts of violence that caused an injury needing medical care of up to 20 days (Art 180 Para 2^2 of the Penal Code) and when acts causing to corporal integrity or health needing medical care of up to 60 days (21 to 60 days, including) – *simple* bodily harm – Art 181 Para 1^1 of the Criminal Code. Procedurally, the text of the two offences, as modified by Law No. 197/2000, states that if the

[14] According to these articles are incriminated as offences *hitting or other forms of violence* (Art 180), *bodily harm* (Art 181) and *serious bodily harm* (Art 182).

[15] Art 305 incriminates deserting of family and Art 306 incriminates ill treatments applied to minors

[16] Regarding the incrimination of marital rape and until the modification of Art 197 Para 2 of the Penal Code, see the comments of Valerian Cioclei, *Drept penal. Partea specială. Infracţiuni contra vieţii*, C.H. Beck Publishing-house, Bucharest, 2009, pp. 243-245

[17] The adhesion took place in 1993

[18] Law 197/2000 amending the Penal Code was published in the Official Gazette No 568/15 November 2000

[19] Lavinia Mihaela Vlădilă, Olivian Mastacan, *Drept penal. Parte generală*, Universul Juridic Publishing-house, Bucharest, 2011, p.187

[20] Laura Maria Crăciunean, *Violenţa în Familie. Circumstanţă agravantă*, Romanian Penal Law Review No. 4/2005, p.52

offence is committed against a family member the criminal action is initiated *ex officio*[21]; in other words, it can be initiated both upon prior complaint from the injured person, as well as ex officio, in the ways stated by the Penal Procedure Code, according to its Art 221 and following. In both cases, even if usually the prior complaint is joined to the involvement of the parties, for violence against family members – despite the fact that the criminal action was initiated ex officio, the legislator allows the reconciliation of the parties[22].

But the modifications brought by Law No 197/2000 did not stop here. In addition to these judicial instruments protecting against family violence, the above-mentioned law added to the general part o the Penal Code another aggravated circumstance, applicable for all offences for which it was not previous stated as aggravating form or as element of other offences[23], namely *the offence of violence against family members* (Art 75 Para 1 Let b), Thesis II). The law does not define the term of *violence* which incorporated it in this aggravating circumstance, but in our and other doctrinaires' opinion[24] it can be interpreted as representing any form of violence, from hitting causing bodily harm to hitting needing medical care from 1 up to 60 days, or which causing the results stated by Art 182 Para 2 of the Penal Code, namely loss of a sense or of an organ, cessation of their functioning, a permanent physical or mental disability, mutilation, abortion or jeopardy on the person's life.

We also must note that the law for the modification of the Penal Code has not stated the same aggravating circumstance for the offence of serious bodily harm, limiting only to the two offences stated by Art 180 and 181. This can only be an unfortunate inconsistency. However, if the serious bodily harm occurs, in any of its forms (typical or aggravated), against a family member we consider as applicable the already analyzed aggravated circumstance, stated by Art 75 Para 1 Let b) of the Thesis II of the Penal Code. Nevertheless, in the Romanian penal system, the effects of an aggravated circumstance are not mandatory for the court, being optional[25]. This introduces an unjustified different regime, between the protection of family relationships against soft and serious violence – where the perpetration of such violence determines the aggravation of the offence and the application of a higher penalty, towards the serious bodily harm, where the perpetration against a family member shall optional determine an increase of the penalty, by applying Art 78 corroborated with Art 75 Let b) of the Criminal Code.

Another novelty inserted by Law No 197/2000 has a penal and a criminal procedure feature. It refers to the introduction of a new security measure, namely the "prohibition to return to the family home for a determinate period"[26]. In terms of criminal procedure, the new security measure is the only mean to keep the perpetrator away from its victim. The measure is insufficient and inefficient. Moreover, the fact that we never met a sentence to valorise this measure should "ring a bell" for the legislator. On one hand, this measure can only be invoked by the court when the decision of conviction is issued, which means that during prosecution and trial the victim, in lack of alternatives for a home, should have to bear the manifestations of the perpetrator at her address. The fear for even more serious violence, constant threats can determine the victim to stop the penal trial, thus the "*reconciliation of the parties*" shall be the best solution for powerless victims.

On the other hand, the court shall use the measure only if the defendant shall be convicted to at least one year of imprisonment. Such decisions of conviction shall rarely be used for the offence of

[21] According to Art 180 Para 3 and Art 181 Para 2 of the Penal Code

[22] According to Art 180 Para 4 and Art 181 Para 3 of the Penal Code

[23] As the case of the offences stated by Art 180-181 or Art 197 of the Penal Code

[24] Laura Maria Crăciunean, *op.cit.*, p.52

[25] According to Art 78 of the Penal Code: "*In case of aggravating circumstances, one may apply a penalty up to the special maximum*"

[26] The new security measure is stated by Art 112 Let g) and Art 118^1 of the Penal Code

hitting and other violence[27]. And this is not all. Another condition imposed by the law, states that the victim should request the use of this security measure. Previous commentaries regarding the fear of the victim for even serious violence and constant threats, shall determine her to not request this measure to the court. We showed in a different article that, based on its active role, the court should ask the victim if intends to request the application of this measure. The emotion, lack of judicial knowledge, if the victim is not assisted by a lawyer, shall determine the court to have a minimum moral and judicial support for the victim[28].

The inefficiency of the regulation is incremented also by the *serious danger* for which this criminal sanction can be applied. In other words, leaving to the court's appreciation, as if all the other conditions would not be enough to restrain the framework of its application, the legislator states that the danger for the victim to be very serious. The legislator considers that "soft" violence does not impose such measure. So, the victim should be supporting more violence, without reacting, because the state is not able to protect her until she ends up in a hospital with three broken ribs, full of bruises, unconscious or almost dead?! Therefore, how long should the victim endure violence, for the court to apply a security measure? Such rhetorical questions judicially aim the core of the issue. Several states have stated in their penal legislation the situation of family violence and gender based violence, have stated penal and criminal procedure means for the victim to enjoy security and to detach herself from a humiliating situation. Such measures, which we have encountered in a project for a legislative modification, sustained by deputies from all the parliamentarian parties – considered to be a valorous initiative, are the *restraining order* and the *interdiction order*, with the possibility to invoke temporary measures, even by the prosecutor in the stage of criminal prosecution.

Finally, without debating too long this issue, which is not the object of our analysis, we must add, that along with other authors[29], we consider that this security measure can be invoked not only for the offence of hitting and other violence – *the law being vague* – but for all types of offences committed in family imply violence or physically or bodily harm the victim.

A final modification inserted by Law No 197/2000 regarded the abolition of Art 197 Para 5 incriminating rape. According to this paragraph, the active subject of the rape was unpunished if he would marry his victim. Several doctrinaires rose against such provision[30], which was the result of the Middle Age's legislation. First of all immoral, such provision offered more chances of getting away with the offence for this person who had no respect for women – *who usually are the passive subject of this type of offence*.

After one year, Government Emergency Injunction No 89/2001[31] completed the framework of family violence with the special incrimination of rape between family members, especially between spouses[32]. Many renowned authors consider as auspicious the explanation of such incrimination, except the fact that such incrimination received an aggravated form, pleading for its simple form. Some authors (*Matei Basarab and colab., op.cit*) consider that the simple form is more appropriate

[27] Art 180 Para 1^1 states the punishment by imprisonment from 6 months to one year, and Art 180 Para 2^1 states the punishment by imprisonment from one to 2 years.

[28] Lavinia Mihaela Vlădilă, Olivian Mastacan, *op.cit*, p.189

[29] Ilie Pascu, *Interdicția de a reveni în locuința familiei*, in the Romanian Penal Law Review No 4/2002, pp.44-45.

[30] Valerian Cioclei, *op.cit,* p. 248. Ortansa Brezeanu, Aura Constantinescu, *op.cit,* p.76

[31] Government Emergency Injunction No 89/2001 amending the Penal Code's offences on sexual life, published in the Official Gazette No 338/26 June 2001, was approved with amendments by Law 61/2002, published in the Official Gazette No 65/30 January 2002

[32] Matei Basarab, Viorel Paşca, Gheorghiță Mateuț, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirtişan, Ramiro Mancaş and Cristian Miheş, *Codul penal comentat. Partea specială, vol. II,* Hamangiu Publishing-house, Bucharest, 2009, p.281; Valerian Cioclei, *op.cit,* pp.243-244; Alexandru Boroi, *Drept penal. Partea specială*¸ C.H. Beck Publishing-house, Bucharest, 2006, p.166

for the incrimination of rape, adding the possibility of reconciliation of the parties. A similar solution – *to the proposal to separately incriminate the rape between spouses, but with the possibility for reconciliation of the parties or the withdrawal of the prior complaint* – is accepted by other doctrinaires, such as Ilie Măgureanu and Alexandru Ionaş, who appreciate as unusual the situation of the spouse, who, *disagreeing the right of the other spouse to intimate life*, must not be considered as inferior towards other persons with who the victim does not have a family relationship[33]. From our perspective, though we totally agree with the incrimination of rape between spouses and between family members, we consider that the aggravated form was preferred by the legislator in the context of the separate incrimination of family violence. From our point of view, even if we could agree with the possibility of the offender to reconcile with his victim, or the victim to withdraw her complaint, we consider that in the context of gender based violence, that the aggravated form must be kept. From a person who promises to protect his spouse, to support her in her difficult moments, it is legally expected to act in the same manner regarding their intimate life. Therefore, the failure to respect the sentimental value of the relationship between the parties must be sanctioned with a more serious penalty but in the normal situation of a rape between unknown persons.

b. Stage two. The regulation of the special law. These were the general regulations in the matter of domestic violence until 2003. There have been made considerable progresses after Law number 217/2003 regarding the domestic violence entered into force. Firstly, the novelty that this law brings up is the one regarding the definition of the concept of "domestic violence". Another new aspect refers to foundation of some bodies in order to support the victims of the domestic violence. But, because we were at the beginning concerning the regulation on this matter, we have noticed a few discordances between this law and the provisions of the penal Code. On the other hand, by comparison with other states, the present regulation of the law and of the penal Code can be substantially improved.

The concept of "domestic violence" is defined for the first time within Law 217/2003 concerning its prevention and fighting against it. According to Art 2 of this law, the domestic violence refers to "…*any physical or verbal action which is deliberately committed by a family member against other member of the same family and that it causes a physical suffering, a mental distress, a sexual suffering or a material prejudice*". In our opinion, these are some forms of violence which are directly committed by family members ones against the others. Besides this form, the law institutes an assimilated form of violence and that is "*the preventing of woman from the exercise of her fundamental rights and freedoms*"[34].

The application frame of the law firstly refers to family members, notion that involves the husband/wife and also the close relatives as this term is defined by Art 149 of the Penal Code: the ascendants, the descendants, brothers, sisters and their children and also the persons that became such relatives by adoption. According to the penal law, in the category of close relatives also enter the natural relatives, on the supposition of adoption[35]. As Art 3 Para 1 Let b) does not make any difference; we consider that the special law provisions enforce to them too. It can be noticed that Art 3 Para 1 Let b) "*does not impose anymore the condition that the close relatives should live or they should run the house together with the doer*", thus the term of family member of the special law is larger than the one of the actual Penal Code.

[33] Alexandru Ionaş, Ilie Măgureanu, *Noul Cod penal comentat*¸ Romprint Publishing-house, Braşov, 2004, pp.170-171; the paper considers the new Penal Code of 2004, but the authors' commentaries are still valid in the actual context.

[34] According to Art 2 Para 2 of Law 217/2003

[35] According to Art 149 Para 2 of the Penal Code

The persons that have established relationships which are similar to those which exist between spouses (the concubines) or between parents and children also belong to this category, these relations have to be proved by the social investigation[36].

Thus, Art 2 generally defines the forms of violence within we include the physical violence, the mental distress, the sexual violence and the material or moral dependence. At the same time, Art 1 Para 2 of the same normative act clearly states the offences which are considered as forms of domestic violence. Thus, amongst the offences which harm the family life are those mentioned in articles: 175, 176, 179-183, 189-191, 193, 194, 197, 198, 202, 205, 206, 211, 305-307, 309, 314-316, 318 and other similar offences provided by the penal Code and also the provisions of Law number 47/2006 concerning the national system of social assistance[37]. We notice that two important regulations on this matter haven't been included in the category of legal texts that state offences which are related to the domestic violence: Art 177 regarding infanticide, Art 203 concerning incest and Art 203^1 concerning sexual harassment. Also, the definition of "family violence" includes only the offences committed with intention, but not those committed out of negligence, as the case of Art 178 – homicide out of negligence or Art 184 – bodily harm by negligence, both stated by the Penal Code, opposite to the opinion expressed by some authors, who include bodily harm by negligence in the category of domestic violence[38].

The law encourages non-governmental organizations to support the assistance programs offered to the victims of the domestic violence[39].

The law has initially instituted a body – *The National Agency for the Family Protection* which had a role in controlling the domestic violence and it also had the obligation to draw up annual reports concerning the evolution of this phenomenon and the measures that were taken in this respect. Because of the difficult financial situation, by Law number 329/05.11.2009 regarding the reorganization of some public authorities and institutions, the rationalization of the public expenses, the support of the business medium and the observance of the frame-agreements with the European Commission and with the International Monetary Fund, the National Agency for Family Protection was dissolved and it has been fused with the National Authority for the Protection of Child Rights, thus it resulted a new body with legal personality – The National Authority for the Protection of Family and Child Rights (ANPFDC). At the same time, all the provisions regarding the role, the objectives and the attributions of ANFP stated in Law 217/2003 were repealed. Then, the Decision of the Government No. 1385/18.11.2009 concerning the setting up, the organization and the functioning of the National Authority for the Protection of Family and Child Rights it was approved; this decision provides only minimal attributions for ANPFDC regarding this matter.

In order to sustain the activity of ANPFDC, the law disposed the formation of a body of social experts that are named *family assistants*; they have to deal with the cases of domestic violence and they have general attributions as: they identify and they keep a list with the families where there are conflicts which can cause violence, they develop activities in order to prevent the domestic violence; they find non-violent solutions by keeping contact with the respective persons, they can request the help of some natural or legal persons in order to solve the situations that generate violence in the family and they also can monitories the observance of the rights that belong to the persons that are forced by the circumstances to appeal to these public shelters[40].

[36] According to Art 4 of Law 217/2003

[37] The text of Law 217/2003 refers to the provisions of the Law 705/2001, but this law was abrogated by Law 47/2006 which was published in the Official Gazette of Romania No 239/16 March 2006, thus we can consider the text as implicitly repealed.

[38] Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, p.75

[39] Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, p.76. According to Art 7 Para 3 of Law 217/2003

[40] According to Art 13 Para 1 of Law 217/2003 as it has been modified.

Another institution that was inserted in order to solve the domestic violence cases is the mediation. The mediation can develop only at the interested person's request. The proceeding develops by the agency of the family council or it can be developed by authorized mediators. The attempt to mediate the situation does not impede the development of the criminal proceeding or the enforcement of the actual law provisions[41].

In order to help the victims of the domestic violence, the law has instituted the so-called *shelters* which are bodies with or without legal personality. Their principal role is that to ensure the protection, the housing, the care and the counselling of the victims of domestic violence that have to resort to this social assistance service[42]. Besides these shelters, the law has disposed the setting up of *recovery centres* that beside housing and care, they firstly ensure their rehabilitation and their social reintegration. The law didn't forget the aggressors; for them it has disposed the organization of some *assistance centres* which are created as bodies with or without legal personality which ensure, in a residential or semi-residential regime, their rehabilitation, their social reintegration, educational measures, counselling and family mediation measures. For them, the measures of family counselling are completed with those of specific treatments, for example: psychiatric treatment, addiction treatment which is developed within medical structures with which there have been drawn up conventions. No matter the situation, the victims' or the aggressors' assistance and internment in the centres mentioned before can be made only having their consent. For the minor, the agreement is given by the non-aggressor parent or by the legal representative[43].

From the procedural point of view, the law states that the security precautions provided by art. 113 and 114 and also the one provided by art. 118^1 can be taken by the court with a provisory character not only during the criminal prosecution but also during the trial[44]. In our opinion, this stipulation seems to be very interesting. Concerning the safety precaution that refers to the interdiction to come back to the family residence, it has to be noticed that the special law departs from the general one, which is the penal Code. This derogation enforces only during the criminal prosecution and during the first stage of trial, when the court analyses the situation and it disposes that the measures taken with a temporary character should cease or they should become definitive, according to the legal text which enforces to them. The provisory measures are disposed by findings which are only submitted to recourse in a term of 3 days which runs from the pronouncing for the present persons and it runs from the communication for those who were absent.

Although Law 217/2003 regarding the domestic violence brought some improvements by comparison with the previous situation, it is not deprived of criticism. Unfortunately, in Romania there is not a restriction or an interdiction order which would give a real protection to the victims of domestic violence, as it exists in other European legislations. As we have already commented, the victims of domestic violence have to live with the aggressor even if they initiate a juridical approach. In our country, the family violent actions for the most frequent situations (Art 180 and 181 of the Penal Code) are not prosecuted *ex officio* or as a consequence of the denunciation of any person who has information about these actions, as it happens in the majority of the European states, thus, the reconciliation of the parties absolves the doer from criminal liability. The measure provided by the Penal Code in Art 118^1 can be taken after the aggressor is convicted to imprisonment for at least one year and if he represents a serious danger for the other family members. The decision of conviction of the aggressor is the only measure for protection of the victim. Consequently, the actual measures cannot avoid the imminent danger in the case of domestic violence. Besides, there are no measures of protection with a preventive character that could eliminate the danger and prevent the offences stated

[41] According to Art 19 and 20 Para 1 and 2 of the Law 217/2003 as it was modified.
[42] According to Art 23 and 24 of Law 217/2003 as it was modified.
[43] According to Art $25\text{-}25^1$ of Law 217/2003 as it has been modified.
[44] According to Art 26-28 of Law 217/2003 as it was modified.

in the category of domestic violence; detention and remand are subjected to some restrictive conditions and thus, inapplicable in most cases of domestic violence.

c. Stage three. The new Penal Code, adopted in 2009, but did not came into force[45], inserts new important modifications in the system of penal protection of the family.

Thus, to speak about family violence we must, first of all, define the notion of *family* or *family member*. According to the new provisions of Art 177, family member includes: (1, a) *ascendants and descendants, brothers and sisters, their children, as well as persons who gained this statute through adoption, according to the law* (until here the text is identical with Art 149 Para 1 of the actual Penal Code); (1, b) *the spouse* (here it is added the hypothesis stated by Art 149[1] Thesis I of the actual Penal Code); (1, c) *persons who have established relationships similar to those between spouses or between parents and children, if they share a household* (it is a new text for harmonizing the Penal Code and Law 217/2003, in accordance also with other European codes, especially with its source of inspiration, the Spanish Penal Code – Art 173 Para 2[46]. The introduction of concubines in the legal content of the notion of family member, it is justified by the existence of a large number of couples who live in a free union, there is no legal reason the deny their protection similar to that offered to married couples[47]); (2) the provisions in the criminal law with regard to close relatives, within the limits of the previous paragraph letter a), shall apply in case of adoption with full effects, both for the adopted person, as well as for his/her descendants and with regard to the natural relatives (text identical to Art 149 Para 2 Thesis I of the actual Penal Code; the text was adapted and harmonized with the actual provisions on adoption, which no longer differentiate between full adoption and restrictive adoption for more than 15 years).

Another significant modification regards the regime of the penalties. The security measure of the *prohibition to return to the family home for a determinate period* was eliminated, among other security measures – as previously shown it was inoperable anyway. But the new Penal Code replaces it by introducing as elements of the complementary penalty the prohibition of certain rights in the following situations:

- The right to communicate with the victim or her family[48];
- The right to come near the house, workplace, school or other places where the victim unfolds social activities, in the conditions established by the law[49].

Though the Penal Code does not associate these two situations with domestic or gender based violence, we note that they are very close to the content of the restriction and interdiction order.

These two rights can be prohibited for 1 to 5 years, are expressly applied by the court when the law states it, and optional when the court decides for a fine or for imprisonment and when, given the nature and gravity of the offence, the circumstances and the offender consider the penalty as necessary[50]. As well as in the situation of the *prohibition to return to the family home for a*

[45] The new Penal Code was stated by Law 286/2009, published in the Official Gazette No 510/24 July 2007

[46] According to this text of the Spanish Penal Code, which represents an aggravated form of the offence of *torture and other offences against moral integrity*, it is considered as passive subject the *concubine or the person to whom the aggressor was or still is involved in an affective relationship, even if the no longer share a household, descendants, ascendants, natural or adopted siblings, or other related persons of the victim or of the person with who the aggressor shares a household, minors, incapable persons, who lived with the aggressor or who are subjected to the active subject by a relation of power, guardianship, care or protection, or any person who is involved in any type of relationship assuming his integration in a household, as well as against persons, who as a result of a particular type of vulnerability, are under the care of a public or private centre.*

[47] The exposure for reasons at the new Penal Code

[48] The situation is stated by Art 66 Para 1 Let n) Thesis I of the new Penal Code

[49] The situation is stated by Art 66 Para 1 Let o) Thesis I of the new Penal Code

[50] According to Art 67 Para 1 of the new Criminal Code

determinate period, in this situation the efficiency of the penalty *versus* domestic or gender based violence can be questioned as long as it remains the single way of protecting the victims of such offences. This is because the penalty is executed, partially like in the actual regime, after the decision for conviction or fine or imprisonment suspended under supervision has remained definitive, and in case of imprisonment by execution after it was executed or when it is considered to be executed[51]. Hence, the measure cannot be decided during criminal trial, so that the victim's life, medical condition or freedom shall be subjected to higher risks.

In the area of aggravating circumstances, the new Penal Code introduces some modifications that affect the situation of domestic and gender based violence. Art 77 of the new Penal Code no longer states as aggravating circumstance the perpetration of an offence by violence against family members, maybe because the new Code dedicates an entire chapter to this matter, without considering the situation of other offences which, according to Art 1 Para 2 of the Law 217/2003 represent domestic violence (such as the lack of liberty, rape etc). The impossibility to state one or more aggravating circumstances, as a consequence of the abolition of Art 75 Para 2 of the actual Code – *motivated by the aggravation of the criminal liability by violating the principle of predictability* – the only possibility to aggravate the criminal liability in case of gender based violence is represented by Art 77 Para 1 Let h) (stated by the actual Code in Art 75 Para 1 Let c)) the commission of the offence as a form of gender based discrimination, and in the case of the other forms of domestic violence by applying Art 77 Para 1 Let h), or by using the new introduced aggravating circumstance regarding *the commission of the offence by taking advantage of the victim's vulnerability due to her age* (in the case of minors and elder persons), *health condition* (sick persons), *disability or other causes*.

The special part was enriched with a new chapter[52] dedicated to domestic violence and including two offences. The first offence is stated by Art 199 and it is called "*Family violence*". The offence has two means of perpetration and refers to, because it borrows the content of other criminal offences, and subordinating its content to the norms from which it has borrowed that content.

The first mean, settled by Art 199 Para 1 *consists of the offences stated by Art 188* – murder, *Art 189* – first degree murder, *Art 193* – hitting and other violence, *Art 194* – bodily injury and *Art 195* – hitting or injuries causing death. The second paragraph refers to the possibility that for the offence stated by Art 193, the criminal action to be initiated *ex officio*, making possible the reconciliation of the parties, by comparison with the text of this offence where the criminal action is initiated only upon prior complaint of the victim[53]. But, in addition, though the previous paragraph does not state that family violence includes the offence of bodily harm out of negligence, stated by Art 196, Para 2 refers to the fact that in the situation of this offence if committed by and against a family member the criminal action can be also initiated *ex officio*. It is just a simple omission? The amended text no longer corresponds with Law 217/2003, stating that family violence is represented *only by offences committed with intention*. So, we must understand that bodily harm out of negligence is not domestic violence, but though, talking about the protection of family members, it is possible that criminal action to be initiated ex officio, even if the offence is committed out of negligence.

Returning to the content itself of this offence, it is noticed that the new Penal Code has eliminated all those texts – aggravating circumstances of murder, hitting and other violence and bodily injury from the actual code and inserted them in a new text, called *family violence*.

[51] According to Art 68 Para 1 Let a) - c) of the new Penal Code

[52] We are talking about Chapter III – *Offences committed against a family member*, from Title I – *Offences against persons*

[53] According to Art 193 Para 3 of the new Penal Code

Thus, it appears a new inconsistency with Art 1 Para 2 of the Law 217/2003 which defines domestic violence not only from the perspective of the offences assuming a direct physical violence committed with intention, but also other offences harming the rights of a person, such as rape, privation of freedom, robbery, referring only to those offences regarding the spouse-victim of gender based violence, but not for the case of other family victims.

So, what is the logic conclusion in this case? A first hypothesis, starting from the principle of *specialia generalibus derogant*, would be of the application of the special law to the detriment of the Penal Code; the new text is subsequent to this special law, so that the legislator intended to modify the special law by this new provision?! If we use such interpretation, we would deprive Art 1 Para 2 of the Law 217/2003 of its judicial effects and also the definition given by this law to family violence. It only remains of this law the organizational provisions on the assistance of victims and the possibilities for involvement of local authorities and of specialized organisms created by law or non-governmental organizations with the aim to combat this phenomenon. But this would not be much towards the majority of the Western and European penal texts, which develop the situation and do not restrain it to a minimum physical violence. Thus, Romania would fail in respecting its international and European obligations, to which it has subscribed[54].

Finally, for the dysfunctions between the two texts that would settle family violence, in the case of entering into force of the new Penal Code, we might add that the second text named by the Penal Code as form of family violence is *the killing or harming of the newborn by the mother*, offence stated by Art 200[55]. Art 200 Para 1 is the new version of infanticide with significant modifications. But, as we previously mentioned, Law 217/2003 states infanticide as form of domestic violence. It is true that nowadays infanticide originates in a medical disorder suffered by the mother after giving birth, while in the new text, the disorder considers all possibilities, *without differentiating on its nature*. Extending the reasons of the disorder, in the new context, infanticide as well as harming the newborn, occurred in the same conditions as those stated in the first paragraph, comprises the situations of family violence, but regarding the minor, given his impossibility to defend himself and his early age.

Finally, the last changes in the area of family violence are those regarding offences against sexual freedom and integrity. The new text of rape[56] no longer states the aggravating circumstance on the perpetration of the offence by and against a family member, stated now by Art 197 Para 2 Let b[1]). In exchange, it has partially incorporated provisions regarding incest, thus eliminating the debates on the existence of plurality of offences between rape and incest, and leaving without core the provisions of the appeal for the law resulted from the decision of the High Court of Cassation and Justice No 17/2008 point 2[57]. The same aggravating circumstance is also found in the case of a new offence – Sexual aggressions – Art 219 Para 2 Let b) of the new Penal Code.

---

[54] For instance, it would not respect the European Convention on Human Rights or Recommendation R(2002)5 on the protection of women against violence, Recommendation R(2004)1681 – Campaign to combat domestic violence against women in Europe, Resolution 1512(2006) "Parliaments united in combating domestic violence against women", Recommendation 1759(2006) "Parliaments united in combating domestic violence against women", Resolution R(2007)1582 of the Council of Europe "Parliaments united in combating domestic violence against women".

[55] According to Art 200 of the new Penal Code, *killing or harming the newborn by the mother* consists of: (1) *The killing of a newborn infant, committed immediately after birth, but no later than 24 hours, by the mother who is in a state of confusion, shall be punished by imprisonment from 1 to 5 years*; (2) *If the offences stated by Art 193-195 are committed against the newborn infant immediately after birth, but no later than 24 hours, by the mother who is in a state of confusion, the special limits of the penalty are from 1 month to 3 years.*

[56] See Art 218 Para 3 Let b) of the new Penal Code

[57] See the official High Court of Cassation and Justice's website www.scj.ro

As a conclusion, we can state that both the current, as well as the new provisions on family violence of the Penal Code, especially gender based violence, which is in our special interest for the moment, does not enjoy the most comprehensive, coordinated and clear regulations. Moreover, though many recent European texts explicitly refers to violence against women, and in Spain the regulations have reached the protection of this type of violence, as a gender based violence, the Romanian texts are still clumsy and without efficiency.

III. The evolution of the Spanish legislation

The protection order may contain also penal law measures, as well as civil law protection measures. The latter ones can be taken only upon the request of the victim (as previously shown, the protection order containing penal measures can be issued *ex officio* by the judge), of her legal representative or of the prosecutor, but only if minor children or incapable persons are concerned, if the measures were not already taken by a civil court. The civil law protection measures consist of a decision attributing the exclusive use of the common housing of two persons to the protected person, the establishment of the regime of custody, visits, communication and residence with children, as well as the regime of offering food to them. The civil law protection measures are taken for maximum 30 days. The protection order shall be communicated to the parties and to the public authorities competent in insuring the protection, security, social assistance, juridical, health, physiological measures or any other kind of measures. Also, the protection order shall imply permanent information of the victim on the situation of the defendant, on the status of the adopted protection measures, as well as on the detention of the offender, if necessary. We also considered as very interesting the establishment and existence of a Central Register for the Protection of Victims against Violence (*Registro Central para la Protección de las Víctimas de Violencia Doméstica*) where are registered all the protection orders, representing a mirror of the national situation of domestic violence and also a type of record dedicated to this phenomenon.

Finally, one of the last measures adopted by the Spanish legislator to prevent and stop domestic violence and to protect its victims is the Organic Law 1/28 December 2004 on the measures for protection against gender based violence, called Integral Law, as a consequence of the stated measures.

It is for the first time when Spain evolves from generally debating domestic violence to specifically debating gender based violence, the last name not very popular among the Romanian jurists. Besides the entrance the European and international view of the gender based violence was made in the early 1990, but mostly after 2000[58]. For María Luisa Maqueda the domestic and gender based violence are different from the perspective of the victims: for the first, it is the family, and for the second it is the woman, even if she recognizes the majority of cases of gender based violence occur within the family[59].

In the preamble of the Integral Law, it is shown that this form of violence is no longer just an aspect of the private sector, but it represents a problem of the entire society, *manifesting itself as the most brutal symbol of inequality in society*[60]. This law, *the violence that woman are forced to suffer within the extended family stops to be an "invisible offence", generating a collective rejection and an obvious social alarm.*

Let us see how this law defines gender based violence, which are its leading principles and its main novelties inserted in the penal system.

---

[58] María Luisa Maqueda, *LA VIOLENCIA DE GÉNERO - Entre el concepto jurídico y la realidad social*, in the Spanish Penal Sciences and Criminology Review nr. 08-02 (2006), p. 02:2

[59] *Ibid*, p.02:4

[60] See also in this regard the opinion of María Luisa Maqueda, *op.cit*, p.02:2

According to Art 1, gender based violence represents all types of violence resulted from the discrimination, inequality and domination exerted by the man against women, violence exercised by her ex or actual concubine (*the term also includes the quality of husband*), or by the man with whom the woman is involved in a relationship, even if they no longer share a household. According to professor Luis Arroyo Zapatero the extension of the term "family" as to include fathers, sons, brothers, uncles by alliance of the husband or concubine, minors or incapable persons that shared a household with the victim, the persons who are within the family framework by any relationship, as well as guardians or tutors in centers for vulnerable persons is an exaggeration of the law, despite the fact that he supported the idea of differentiation between domestic and gender based violence, including in the parliamentary sessions that debated the full text of the law[61].

Regarding the equality between men and women promoted by the Integral Law, María Elósequi Itxaso considers that it has a wide meaning, taking into account not the possible rights in politics, economy or the social area, but also the conditions for their full exercise. It is actually equality, according to the author, which starts from the differences specific to the gender that integrates them, without imposing to the woman the man model[62]. The author shows that the guiding principles for the public authorities in applying this law shall be: equal treatment (*it is prohibited any direct or indirect discrimination based on sex, regardless of its manifestation mean*), equal opportunities (*all public authorities shall adopt measures that will guarantee the effective exercise, for women and men, of their political, civil, economic, social or cultural rights*), respecting differences and diversity (*all public authorities shall apply the law by respecting the differences and diversity between men and women*), integration of the gender based perspective (*all public authorities shall integrate the gender based perspective, in the meaning of considering different situations, conditions, aspirations and needs of women and men, aiming to eliminate all inequalities and to promote equality in all the stages of policies and actions: planning, execution and evaluation*), positive action, elimination of stereotypes based on sex[63].

Besides these principles applicable for public authorities, Art 2 of the law states certain guiding principles, among which we emphasize: equipping public authorities with efficient instruments in fighting against gender based violence and assisting its victims in an educational, health care and publicity environment, the creation of an emergency information social service for victims of gender based violence, providing an economic support for female victims of this phenomenon, the creation of an administrative guardianship of the state that will impose public policies to support the victims, strengthening the penal framework, offering the possibility for civil entities, associations and organizations to act against gender based violence, ensuring the transversality of the means of support etc[64].

From the penal perspective, the novelties inserted by the Integral Law refer to the enlargement of the framework of offences – as misdemeanors – of domestic violence, which determines higher penalties, temporary imprisonment, the obligation of adopting the superior limitation of a penalty (it shall be punished by imprisonment from 3 months to 3 years) if the offence is committed by gun or other dangerous instruments threat, in front of minors, in the common domicile or in the victim's domicile or by trespassing either the temporary separation order, the adoption of the security measure

[61] Luis Arroyo Zapatero, *op. cit.*, p. 202. For his presence in the Parliament see the Congress official website (Spanish Chamber of Deputies) www.congreso.es/publicaciones/ on 19 July and 7-9 September 2004.

[62] María Elósequi Itxaso, *Los principios rectores de la Ley orgánica contra la violencia de género*, in Pilar Rivas Vallejo, Guillermo Barrios Baudor coord., *Violencia de género – perspectiva multidisciplinar y práctica forense*, Thomson Aranzadi Publishing-house, Pamplona, 2007, p. 121

[63] *Ibid*., pp.121-123

[64] María Ibáñez Solaz, *Catálogo de principios rectores y derechos previstos en la Ley no.1/2004*, in Pilar Rivas Vallejo, Guillermo Barrios Baudor coord., *op. cit.*, pp. 132-133

of separating the offender from the victim, and the adoption of the plurality of offences between the offence against moral integrity and the offence of ill treatments[65].

Essentially, the evolution of the Spanish legislation with its latter modifications was appreciated as positive, revealing many situations, but also succeeding to protect all the victims terrorized by violence or who could have been dead by now.

Conclusions

Searching for documentation for a wider study on domestic and gender based violence, from which this article represents only a part, I found a book of a Spanish author Miguel Lorente Acosta – *Mi marido me pega lo normal – Agresión a la mujer: realidades y mitos* (*Mi husband constantly beats me – Agresion against women: reality and myth*). Noticing the title I could not stop remembering all the *girls' talk* that I have heard in my childhood when a friend of my family got married. Such lines as: "*You have a good husband, he does not beat you, does not drink, what more do you want?*" were natural in those times (in the vision of communist or non-communist mentalities). The debates on women who were beaten by their husbands or indirect realities, lived by other people, were frequent, about two-three decades ago.

We also live painful realities nowadays, within families were women, with a disturbing majority, a little support from a system that starts functioning, manage to survive a severe beating. But after the system offers them and their children shelter and food for one-two-three months, all these women will return in the same violent and dangerous environment due to their financial and household dependence and, why not, their habit of supporting years of beatings.

So, is Romania ready for a special legislation on gender based violence or it shall be the exception? Are Romanian women aware as the Spanish women that a life under terror is not a life of love, but just a life of vices? Are these women aware that they deserve an infinitely better life and if they choose not to hurt the men that beat them by submitting a complaint against them, they could choose to divorce as fast as possible? Shall the Romanian legislation support them, which by comparison with the Spanish one must be improved with measures to be adopted at the beginning of the penal trial, not only at its ending?

This is just a pleading for life and for a mean of stating that the Romanian legislation on domestic and gender based violence must be change in order to effectively support all the women who suffer in silence and ignorance…

References

Books

- Olivian Mastacan, *Violenţa în familia. Aspecte teoretice şi practice*. Târgovişte: Valahia University Press, 2005.
- Valerian Cioclei, *Drept penal. Partea specială. Infracţiuni contra vieţii.* Bucharest: C.H. Beck Publishing-house, 2009.
- Lavinia Mihaela Vlădilă, Olivian Mastacan, *Drept penal. Parte generală*. Bucuharest: Universul Juridic Publishing-house, 2011.

[65] Luis Arroyo Zapatero, *op. cit.*, pp. 202-203

- Matei Basarab, Viorel Paşca, Gheorghiţă Mateuţ, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirtişan, Ramiro Mancaş and Cristian Miheş, *Codul penal comentat. Partea specială, vol. II.* Bucharest: Hamangiu Publishing-house, 2009.
- Alexandru Boroi, *Drept penal. Partea specială*. Bucharest: C.H. Beck Publishing-house, 2006.
- Alexandru Ionaş, Ilie Măgureanu, *Noul Cod penal comentat*. Braşov: Romprint Printing House, 2004.
- M. J. Cruz Blanca, "*Dreptul penal şi discriminarea pe motive de sex. Violenţa domestică în codificarea din Codul pena*l", in L. Morillas, *Studii penale despre violenţa în familie.* Madrid: Edersa Publishing-house, 2000.
- Eduardo Demetrio Crespo, Luis Arroyo Zapatero, "*El uxoricidio por adulterio en la legislación penal española anterior a la democracia*", in *International symposium on issue of custom and honour killing*, Diyabarkir: Ahader Publishing-house, 2003.
- María Elósequi Itxaso, "*Los principios rectores de la Ley orgánica contra la violencia de género*", in Pilar Rivas Vallejo and Guillermo Barrios Baudor coord., *Violencia de género – perspectiva multidisciplinar y práctica forense*. Pamplona: Thomson Aranzadi Publishing-house, 2007.
- María Ibáñez Solaz, "*Catálogo de principios rectores y derechos previstos en la Ley no.1/2004*", in Pilar Rivas Vallejo and Guillermo Barrios Baudor coord., *Violencia de género – perspectiva multidisciplinar y práctica forense*. Pamplona: Thomson Aranzadi Publishing-house, 2007.

Articles

- Ortansa Brezeanu, Aura Constantinescu, „Violenţa domestică. Reflecţii" in *Romanian Penal Law Review* (2/2007): 68.
- Laura Maria Crăciunean, "Violenţa în Familie. Circumstanţă agravantă" in *Romanian Penal Law Review* (4/2005): 52.
- Ilie Pascu, "Interdicţia de a reveni în locuinţa familiei" in *Romanian Penal Law Review* (4/2002): 44-45.
- Luis Arroyo Zapatero, "Dreptul penal spaniol şi violenţa în cuplu" in *Romanian Penal Law Review* (3/2008):197 and next.
- María Luisa Maqueda, "LA VIOLENCIA DE GÉNERO – Entre el concepto jurídico y la realidad social" in the Spanish Penal Sciences and Criminology Review (08-02 (2006): 02:2.

Official websites

- High Court of Cassation and Justice official website: www.scj.ro
- Council of Europe official website: http://www.coe.int/lportal/web/coe-portal
- United Nations official website: http://www.un.org/en/
- Spanish Ministry of Health, Social Services and Equality official website:
- http://www.seigualdad.gob.es/violenciaGenero/documentacion/home.htm
- Spanish Ministry of Interior official website: http://www.mir.es/
- Spanish Congress official website: www.congreso.es

NEW TENDENCIES IN HUNGARIAN CRIMINAL JUSTICE

Erika RÓTH*

Abstract

This paper intends to describe what happened in the Hungarian Criminal Procedural Law in the last decade. Following the most significant changes we can have an impression of tendencies which have influenced the recent amendments. We can realise that requirements formulated in documents adopted by international organisations (first of all the European Union, the Council of Europe) are more and more decisive in the field of criminal justice as well.

Keywords: *criminal justice, Hungarian law, jurisdiction, mediation, pre-trial detention, suspect, victim*

It is obvious that it is not possible to deal with all new institutions of criminal procedural law in a study devoted to the introduction of recent developments to the readers.

The first question is what kind of tendencies we can speak about. It is possible to make a distinction between **tendencies of positive or negative effect** – both could be found in the short history of the new Code on Criminal Procedure (hereafter CCP) in Hungary. Positive is the effect if the guarantees are strengthened, especially the rights of defence and/or victims, the right to be tried within reasonable time etc., or when the modification serves the development of the given branch of law.

The other point of view could be the **source of modification**. If we examine the tendencies in criminal justice, it means who the mover was, who lodges the proposal, who 'table the bill'. Mainly this is the task of the Government: the Ministry responsible for the given field prepares the bill and discusses it with other ministries and with representatives of the professional circles interested in the modification. Due to Hungarian legislation the social debate is necessary before the Parliament tries the bill. Professionals are also entitled to make a proposal, usually to the Ministry. If the Ministry agrees with the recommended changes the way is very similar to the former case. The third quite frequent possibility is when the individual representative submits a proposal, sometimes with professional assistance. By the law the President of the Republic, the Government, any parliamentary committee or a Member of Parliament are entitled to lodge a proposal before the Parliament.[1] It might be interesting that only the first President of Republic, Árpád Göncz submitted bills to the Parliament and two Presidents who were originally lawyers by profession (Ferenc Mádl and László Sólyom) sent back the most Acts to the Parliament.

When the Government prepares a proposal most likely it is in harmony with the official criminal policy. With this we arrive at the third type of distinction: tendencies most frequently could be **generated by criminal policy or/and by EU requirements, by other international duties of the state or by practical necessities**. There are some modifications of the CCP in reasoning of which the Ministry mentioned lack or contradiction found by practicing lawyers.

What kind of tendencies do we meet in the Hungarian legislation? Before starting a deeper examination of actual tendencies I have to mention some facts in order to make the audience

* Associate Professor, Ph.D., Department of Criminal Procedure and Correctional Law, Faculty of Law, University of Miskolc, Hungary (e-mail: jogerika@uni-miskolc.hu)

[1] Article 6 paragraph 1 of the Fundamental Law of Hungary (25 April 2011)

familiar with the background of the situation. The new Code on Criminal Procedure the Act XIX of 1998 was adopted by the Hungarian Parliament on 10 March 1998 and entered into force only on 1 July 2003. In the five years which elapsed between its adoption and entering into force several modifications changed the adopted rules of the CCP, and that process continued after 2003 as well. To picture the situation it could be mentioned that in the last decade more than 50 modifications concerned more or less rules of the CCP. Sometimes it is not easy to find any tendencies in proposals, because individual representatives also have the right to initiate a modification.

The original aim of the legislator and especially the so called Committee of Professors, which was called upon to make a proposal in the second half of the 1990's was to approach the Anglo-Saxon system of criminal justice and meet human rights requirements by making the trial more important (a more emphasised part of the criminal proceeding) and weakening the role of the investigation; to authorise the defence lawyer and the public prosecutor to examine witnesses etc.[2] These very significant changes were lost before the Act came into effect: the investigation preserved its earlier strong position and the questioning of the witnesses by parties remained exceptional.

Modifications after 2003 concerned and were in connection particularly with

- domestic violence
- the duration (time limit) of the pre-trial detention
- the restriction of presence of the defence lawyer in investigatory actions
- the presence of the public prosecutor at the court trial
- holding the trial in absence of the accused (if (s)he was duly summoned and fails to attend)
- mediation and
- cases of emphasized significance etc.

Meanwhile, **in 2004 Hungary joined the European Union** and after that time even the EU law had an effect on our Code: the legislator always has to examine whether a bill is in harmony with the EU law.

Before dealing with some important topics in more detailed form I would like to devote some words to our constitutional changes. The old Constitution of Hungary originated in the Act XX of 1949. However, modifications in the elapsed 60 years concerned almost all articles of it. Notwithstanding that fact the pressure upon the actual leading parties and on the Government was very serious in order to prepare an absolutely new Constitution. The preparation took several years and in that period basic ideas changed frequently. Finally in 2011 (25 April) a new constitution – so called "**The Fundamental Law of Hungary**" was adopted by the large majority (more than 2/3) and entered into force on 1 January 2012. It is quite interesting that after a long period when the political and professional debate took place the "final" preparation of the new fundamental law needed less than a year. The Constitution concerned some procedural rules as well, e.g. the name of the courts, but values and fundamental rights guaranteed at the highest level were preserved.

Some changes of the CCP **simplified the procedure and made it quicker**, which is in harmony with requirements of human rights conventions as they, like the European Convention on Human Rights guarantee that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[3] But the question concerning reasonable time or speeding up the administration of justice is: how much and to what extent we have

[2] About the reform ideas and the reality see "A legfontosabb kérdésekben nem értünk el eredményt": Király Tibor akadémikussal és Bárd Károllyal, az ELTE Büntetőjogi Tanszékének vezetőjével Fahidi Gergely és Tordai Csaba beszélget. In: Fundamentum, 2/2002. pp. 41-45 and Hack Péter - Farkas Ákos - Bodor Tibor - Túri András - Láng László - Bánáti János: A büntetőeljárás reformja. In: Fundamentum, 2/2002. pp. 49-69.

[3] Article 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4. XI.1950

to/may accelerate the procedure, which always means the restriction of guarantees. Critical voices emphasized that this is demolition of guarantees and not an absolutely necessary sacrifice or loss but only political intention.

After that theoretical introduction I would like to deal with some selected topics of Hungarian criminal justice as **coercive measures restricting personal freedom of the suspect, victims' role, measures making the procedure quicker and simpler and special rules of procedure in extremely important cases**.

Coercive measures

Changes occurred in the regulation of coercive measures are relatively positive: the choice has been widened when the legislator allowed to order house arrest or accept the bail offered by the defendant or by the defence lawyer when it has probable cause to believe that the presence of the defendant in procedural actions may be ensured by these measures. Unfortunately in the practice of the courts these measures, which – among others - are alternatives to pre-trial detention are very rarely used.

The other modification of the CCP made the **time limits of the pre-trial detention** more detailed deciding the maximum time that an accused may spend in pre-trial detention before the decision of the first instance court. Time limits are in connection with the punishment which could be imposed in a case taking into consideration the prescribed punishment in the Criminal Code: the more serious sanction may be imposed, the longer the maximum period of pre-trial detention (1, 2, 3 or 4 years) is. The reasoning of the bill mentions that the more serious or more complicated the case is, the more time the collection and examination of evidence need and when there is a danger that the suspect might escape or obstruct or jeopardise the evidentiary procedure it might be necessary to extend the pre-trial detention. That solution is more or less accepted in the practice of the European Court of Human Rights, and met requirements of the former Constitution of Hungary and the updated Fundamental Law of Hungary.

Fight against family/domestic violence has not avoided the criminal procedural law, although both theoretical and practical lawyers agree that the criminal law and especially the criminal procedure is not the appropriate field for finding the solution of that problem. Fortunately only one new legal institution '**Keeping distance**'[4] was introduced in the CCP enriching the range of coercive measures. Keeping distance serves two aims: to protect the victim and to ensure the success of the proceeding. Only the court is authorized to order the keeping distance for a period between 10 and 60 days when the objectives otherwise desired to be attained through pre-trial detention, can also be realised this way.

Mediation and strengthened position of victim

While pre-trial detention and other coercive measures restricting right to liberty concern the position of the accused, the next legal institution I would like to speak about influences the outcome of the procedure from the defendant's and the victim's point of view as well. This is **mediation**,

[4] In some systems of law the name of the similar measure is protection order, but the restrictions connected with them are very similar. See e.g. Raymond Teske Jr.: Legal Procedures Available for the Protection of Women from Intimate Partner Violence. In: New tendencies in Crime and Criminal Policy in Central and Eastern Europe. Proceedings of the 65th International Course of the International Society for Criminology 11-14 March 2003, Miskolc-Hungary. Hungarian Society for Criminology. Bíbor Publishing House Miskolc, 2004. pp. 60-64

which, introduced in 2007, is quite a new possibility in the Hungarian criminal justice.[5] It has to be mentioned that **the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)** played a very significant role in the introduction of mediation in criminal matters in Hungary. Article 10 of the Framework Decision required that each Member State shall seek to promote mediation in criminal cases between the victim and the alleged offender and to take into account the agreement reached in the mediation procedure.[6]

The key person of mediation is the public prosecutor, who may suspend the investigation for six months and send the case to the mediator if the law allows mediation and both the suspect and the victim agree in taking part in that type of solution finding procedure. During this period mediators try to reconcile the offender and the victim and bring about an agreement between them. The mediation process is successful when the offender has paid compensation or has ensured the compensation of the victim in another way. It is important to emphasize that mediation is not part of the criminal procedure: only the start is relevant when the public prosecutor or the court makes a decision and suspends the procedure and the result of the procedure which influences the closing of the case. The impact of the mediation on the case depends not only on the willingness of the accused but on the length of the punishment prescribed for the given case. So the public prosecutor

- may terminate the case if the offence is punishable by a maximum of three years' imprisonment;
- if the offence is punishable by more than three years' but less than five years' imprisonment, the prosecutor files indictment because only the court can evaluate the offender's conduct as active regret.

When the offender began the compensation of the victim but has not yet fulfilled his duty completely the prosecutor may postpone the indictment, but only in the case of criminal offence punishable by a maximum of three years' imprisonment.

Mediation is becoming a more and more accepted and widespread institution in Hungary: it has positive effect from the victim's, suspect's and prosecutor's point of view: victims and suspects have a chance to be satisfied and the public prosecutor may close the case in a relatively early stage and avoid a probably long trial. It has to be mentioned that not only the public prosecutor but the court may order mediation either during preparation of trial or during the trial of the court of first instance. (In the appeal proceeding before the court of the second or third instance there is no possibility to transfer the case to the mediator.)

The position of the victim was strengthened not only by introducing mediation but by other provisions of the CCP. Here I would like to mention only the right to act as the additional private prosecutor as an example.[7]

Some victim's rights are limited during the investigation and almost unlimited in the court proceeding.

---

[5] Mediation was introduced by the Act CXXIII of 2006 on mediation applicable in criminal cases which entered into force on 1 January 2007.

[6] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) *Article 10*

Penal mediation in the course of criminal proceedings

1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.

2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.

[7] See more about the position of victim in Erika Róth: Position of Victims in the Criminal Procedure in the Context with Requirements of the European Union. In: European Integration Studies, Volume 9, Number 1 (2011) pp. 109 - 120

Measures making the procedure quicker and simpler

Not only in Hungary but all over Europe prevailed a very strong tendency to accelerate and simplify the administration of justice. The reason of it was that in the last 20-30 years the number of cases has drastically increased and not only the number but the complexity of cases caused intolerable workload and delay in the criminal proceedings. **In 1987 the Committee of Ministers of the Council of Europe adopted a Recommendation** in which they summarised applicable measures in order to ensure proper working of the criminal justice systems taking into consideration that "the aim of the Council of Europe is to achieve a greater unity between its members."[8] This Recommendation is an actual guideline even nowadays if a legislator considers (and it has to consider because of the pressure on the criminal justice system) simplification of administration of criminal justice. In Hungary the range of institutions of criminal procedural law which provide remedy for unacceptable length of the procedure became wider and wider. Here I would like to mention only a legal remedy called objection to delay in proceeding and some special procedure the aims of which is definitely the acceleration and simplification of the procedure, e.g. waiving the right to trial, omission of the trial and arraignment. There are examples which on the one hand support the simplification of the procedure but on the other hand weaken the significance of the trial, e.g. offenders are not required to appear before the court, written records prepared during the former stage of the procedure are allowed to be read instead of (repeated) hearing of the witnesses, the experts and the defendants in the trial, in absentia procedure etc.

One very effective solution of decreasing the workload of the courts is discretionary prosecution: waiving or discontinuation of proceedings either in conditional form or without prescribing conditions the suspect has to comply.

In Hungarian CCP all forms of mentioned discretionary prosecution exist: termination of investigation, partial omission of the indictment, postponement of an indictment and sending the case for mediation.

Procedure in cases of emphasized significance

Not such a story of success is one of the most recent modifications (Act LXXXIX of 2011) of the Code which has introduced **special rules for procedure in cases of emphasized significance**. I can say that these rules are one of the most criticised steps of the legislator. The curiosity of the legislation was that the committee which lodged the proposal was the Committee of Constitutional Affairs and the other committee which discussed the proposal was the Committee which deals with – among others – questions of human rights. The consequence was that the new set of rules suffered from constitutional and human rights problems. I would like to mention only some examples to describe the situation: e.g. the maximum period while the suspect was allowed to be held in custody without court decision was extended up to 120 hours (in normal cases the upper limit is 72 hours), which is not acceptable in the practice of the European Court of Human Rights. The other problematic solution was the restriction concerning connection between the suspect (more precisely only 'arrested person') and the defence lawyer. As the original version of the new chapter prescribed the public prosecutor had right to order the prohibition of contact in the first 48 hours of remand in custody. There was no remedy allowed against that measure of the prosecutor. Selection of crimes declared as especially significant was criticized as well. These were politically sensitive crimes and other crimes punishable by long term imprisonment. Five motions arrived to the Constitutional Court challenging the rules of the new chapter. One from the President of the Supreme Court, one from two individual representatives of the Parliament, one from the President of the Hungarian Bar

[8] Preamble of the Recommendation No. R (87) 18 of the Committee of Ministers to Member States concerning the Simplification of Criminal Justice.

Association and two from other persons. The Constitutional Court tried the case quite quickly and made a decision saying that some rules (I mentioned earlier) are unconstitutional and mean violation of international treaties.[9]

As it is said that criminal procedural law is applied constitutional law[10] – guarantees of criminal justice have their roots in constitutional law. International (multilateral) treaties and practice of international organisations founded with the aim of protection of human rights have definitive effect on the legislation. The new tendency is that EU law concerns some topics of criminal and criminal procedural law and we can say that the influence of EU legal instruments on national criminal justice will be more significant due to the principle of mutual recognition.

References

- Király Tibor akadémikussal és Bárd Károllyal, az ELTE Büntetőjogi Tanszékének vezetőjével Fahidi Gergely és Tordai Csaba beszélget. In: Fundamentum, 2/2002
- Hack Péter - Farkas Ákos - Bodor Tibor - Túri András - Láng László - Bánáti János: A büntetőeljárás reformja. In: Fundamentum, 2/2002
- Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)
- Preamble of the Recommendation No. R (87) 18 of the Committee of Ministers to Member States concerning the Simplification of Criminal Justice
- Ákos Farkas – Gábor Pap: Alkotmányosság és büntetőeljárás. In: Kriminológiai és Kriminalisztikai Évkönyv, Kriminológiai és Kriminalisztikai Tanulmányok. XXX. Kötet, IKVA, Budapest, 1993.p. 65 (by making reference to Kägi.)

[9] Decision of the Constitutional Court of Hungary No. 166/2011. (XII.20.)

[10] Ákos Farkas – Gábor Pap: Alkotmányosság és büntetőeljárás. In: Kriminológiai és Kriminalisztikai Évkönyv, Kriminológiai és Kriminalisztikai Tanulmányok. XXX. Kötet, IKVA, Budapest, 1993.p. 65 (by making reference to Kägi.)

PROCEDURAL IMPLICATIONS OF THE ILLEGAL ADMINISTRATION OF EVIDENCE DURING A CRIMINAL TRIAL

Bogdan-Florin MICU *

Abstract

As the title suggests, the purpose of this study is to analyze the procedural implications of the illegal administration of evidence. The present paper begins with a short presentation of criminal trial probation, and continues with the analyses of the conditions with which a proof has to comply in order for it to be administered in the trial, as well as the analyses of the procedures of administration themselves. Another part of the study deals with the principles that should govern the administration of evidence during the criminal trial, respectively the principle of legality and loyalty (regulated in article 64 respectively 68 of the Criminal Procedure Code) as well as the European Court of Human Rights regulations. In spite of the weak criminal framework that exists regarding the illegal administration of evidence, the outcome of a trial can be radically changed based on how the evidence is administered. Therefore, this study also focuses on the consequences of the illegal administration of evidence in the criminal trial, which will be dealt with by analyzing which sanction should be applied, if any exists. The study will not be based solely on the normative guidelines, but also on the judicial practice contained in decisions, which exist in this criminal framework, given by various courts in the country. Last, but not least, this study shall present the legal changes which will occur once the new Criminal Procedure Code shall come into force.

Keywords: *administration of evidence, criminal trial probation, legality and loyalty principles, Criminal Procedure Code, criminal framework*

Introduction

One cannot imagine a criminal trial without evidence. In doctrine it has been defined as being the element with informative relevance over all aspects of the criminal cause.[1] Articles 62 to 135 of title III of the Criminal Procedure Code regulate the means of evidence. The outcome of a trial relies on the legality of illegality of the evidence administered.

According to article 62 of the Criminal Procedure Code in order to find out the truth, the criminal investigation body and the court must clarify the case under all its aspects, on the basis of evidence.

Article 63 states that any fact that leads to the acknowledgement of the existence or non-existence of an offence, to the identification of the person who committed it and to the discovery of the circumstances necessary for the fair resolution of the case is considered evidence.

The value of the evidence is not established in advance. The criminal investigation body and the court appreciate each piece of evidence according to their own convictions, formed after examining all the evidence administrated, and using their own conscience as guide.

* Associate Professor Ph.D., Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (e–mail: bogdan.micu@mnpartners.ro)

[1] Dongoroz I, „Explicații teoretice ale Codului de procedură penală român", ed II, C.H. Beck, 2003, Bucureşti,p. 168

The means of evidence are outlined in article 64, these are: the testimonies of the accused person or the defendant, the testimonies of the victim, of the civil party or of the party who bears the civil responsibility, the testimonies of the witnesses, the writings, the audio or video recordings, the photos, the probative material means, the technical-scientific findings, the forensic findings and the expertise.

Beginning with this article the illegality of evidence is brought into discussion and it is clearly stipulated that pieces of evidence that were illegally obtained may not be used in the course of the criminal trial.

Before regulating each mean of evidence individually, the Criminal Procedure Code regulates the problems of administrating the evidence, the right to prove the inconsistency of evidence, the conclusiveness and usefulness of evidence and the interdiction of means of constraint. The task of administrating the evidence during the criminal trial belongs to the criminal investigation body and to the court.

Upon request from the criminal investigation body or the court, any person who knows of a piece of evidence or holds a means of evidence must reveal or present it. The accused person or the defendant benefits from the presumption of evidence and is not obliged to prove his/her innocence.

In case there is evidence for his/her guilt, the accused person or the defendant has the right to prove their inconsistency.

During the criminal trial the parties may propose pieces of evidence and may request their administration. The request for administration of a piece of evidence cannot be rejected, if the respective piece of evidence is conclusive and useful.

Approval or rejection of requests shall be motivated. It is forbidden to use violence, threats or any other constraints, as well as promises or encouragement with the purpose of obtaining evidence. Also, it is forbidden to force a person to commit or to continue committing an offence with the purpose of obtaining evidence.

European Dispositions Regarding the Illegality of Evidence

With the European Convention of Human Rights a series of problems regarding the legality of evidence have arisen. Illegally obtained evidence consists of evidence obtained in violation of a person's human rights guaranteed by the European Convention of Human Rights. It will usually be in breach of their right to respect for private life under article 8 ECHR or in violation of the prohibition on torture, inhuman or degrading treatment or punishment guaranteed by article 3 ECHR.

Article 6 European Convention of Human Rights requires a presumption of innocence on the accused. To prove its case, the prosecution must obtain evidence, and not only one piece of evidence, but as many as possible in order to be able to corroborate them.

The prosecution may resort to improper means to gather evidence in support of their position especially if obtaining evidence in conventional ways proves unfruitful. Evidence obtained in this matter cannot be accepted so that the right to a fair trial and the principle of finding out the truth.

The exercise of the courts discretion to exclude evidence has not been drastically altered as a result of the incorporation of the European Convention of Human Rights into domestic law by way of the Human Rights Act 1998.

The European Court of Human Rights confirmed that real evidence obtained in breach of the accused's right to private life guaranteed by article 8 ECHR such as through covertly obtained video or audio recordings remains admissible and does not violate the accused's right to a fair trial guaranteed by article 6 ECHR as the right to private life is not an absolute right.

The fact that their decisions are in accordance with article 3 ECHR is guaranteed by the courts which states that torture and inhuman or degrading treatment or punishment are strictly prohibited.

The guarantee is given due to the fact that the right against torture is an absolute right. It acts as a means to ensure conformity with the accused's fundamental right against self-incrimination and is also a means of deterrence, to ensure that torturers will never be rewarded for their improprieties.

According to article 148 of the Romanian Constitution, the European legislation has to be applied, thus the right to a fair trial, the right to respect of private life and article 3 against torture need to be upheld during a Romanian criminal trial.

Analysis of the Means of Evidence

In order to determine what the conditions for the legality of evidence are, an analysis of each means of evidence is required. The Criminal Procedure Code begins with article 69 with the statements of the accused person or the defendant.

According to this article the statements given by the accused person or defendant during the criminal trial may lead to the truth only to the extent to which they are corroborated with facts and circumstances resulted from all the evidence in the case.

Article 71 regulates the modality of hearing, thus every accused person or defendant is heard separately. During the criminal investigation, if there are several accused persons or defendants, each of them is heard without the others attending.

The accused person or defendant is first left to declare everything he/she knows in relation with the case. The hearing of the accused person or defendant cannot begin by reading or reminding the statements that the latter has previously given in relation with the case. The accused person or defendant cannot present or read a previously written statement, but he/ she may use notes for details that are difficult to remember.

Another means of evidence are the statements of the victim, the civil party and the party bearing the civil responsibility. The hearing of the victim, of the civil party and of the party bearing the civil responsibility is conducted according to the provisions regarding the hearing of the accused person or defendant, enforced accordingly. (article 77)

Witnesses' statements can prove to be a crucial means of evidence. When there are contradictions between the declarations of the persons heard in the same case, the respective persons are confronted, if this is necessary for the clarification of the case. These statements, despite being a crucial part in finding the truth need to be corroborated with other evidence.

According to article 89 documents may serve as means of evidence if they contain reference of deeds or circumstances that may contribute to revealing the truth. The forms in which any statement is to be recorded, at the stage of criminal prosecution, shall be recorded and numbered beforehand, as forms with a special status, and after filling in, will be introduced in the case file.

One of the most controversial means of evidence is audio or video interceptions and recordings. Article 91 regulates conditions and cases of interception and recording of conversations or communications, the bodies performing interception and recording, certification of recordings, image recordings and checking the means of evidence.

These means of evidence may be technically examined at the request of the prosecutor, of the parties or ex officio. The recordings presented by the parties, may serve as means of evidence, if they are not forbidden by the law.

The interceptions and recordings on magnetic tape or on any other type of material of certain conversations or communications shall be performed with motivated authorization from the court, upon prosecutor's request, in the cases and under the conditions stipulated by the law, if there are

substantial data or indications regarding the preparation or commitment of an offence that is investigated ex officio, and the interception and recording are mandatory for revealing the truth.

The authorization is given by the president of the court that would be competent to judge the case at first instance, in the council room. The interception and recording of conversations are mandatory for revealing the truth, when the establishment of the situation de facto or the identification of the perpetrator cannot be accomplished on the basis of other evidence.

The authorization of interception and recording of conversations or communications is done through motivated closing, which shall comprise: concrete indications and facts that justify the measure; reasons why the measure is mandatory for discovering the truth; the person, the means of communication or the place subject to supervision; the period for which the interception and recording are authorized.

The Criminal Procedure Code contains regulations of material probative evidence. The objects that contain or bear a trace of the deed committed, as well as any other objects that may serve to reveal the truth may serve as material means of evidence. The objects that were used or destined to be used for committing an offence, as well as objects that are the result of an offence are also material means of evidence. (article 94 and 95).

Technical – scientific and legal – medical acknowledgments and expertise are also considered to be means of evidence. Article 112 states that when there is the danger that some means of evidence might disappear or some states of facts might change, and the immediate clarification of deeds and circumstances related to the case is necessary, the criminal investigation body may resort to the knowledge of a specialist or technician, ordering ex officio or upon request a technical-scientific acknowledgment.

The technical-scientific acknowledgment is usually performed by specialists or technicians working for or affiliated to the institution to which the criminal investigation body belongs. It may also be performed by specialists or technicians working for other bodies.

Article 115 states that the operations and conclusions of the technical-scientific and forensic acknowledgment are written down in an official report. The criminal investigation body or the court, ex officio or at the request of any of the parties, if they consider that the technical-scientific or forensic report is not complete or that its conclusions are not accurate, has it redone or orders an expertise.

When redoing or completion of the technical-scientific or forensic acknowledgment is ordered by the court, the report is sent to the prosecutor, in order for the latter to take measures for its completion or redoing.

Articles 116 to 127 regulate expertise as a means of evidence. When, for the clarification of certain deeds and circumstances of the case, in order to find out the truth, the knowledge of an expert is necessary, the criminal investigation body or the court order, ex officio or upon request, an expertise.

When the criminal investigation body or the instance discover, ex officio or upon request, that the expertise is not complete, it orders an expertise supplement, either to the same expert or to another.

Also, when it is considered necessary, the expert is asked for supplementary written explanations or is called to give verbal explanations in relation with the expertise report. In this case, the hearing is conducted according to the provisions regarding the witnesses' hearing.

Supplementary written clarifications may also be requested from the forensic service, the criminological expertise laboratory or the specialized institute that completed the expertise. If the criminal investigation body or the court has doubts about the accuracy of the expertise report conclusions, they order a new expertise.

Field investigation and reconstruction play an important role in the criminal process. Article 129 stipulates that field investigation is done when it is necessary to establish the situation of the place where the offence was committed to find out and settle the traces of the offence, to establish the position and condition of the material means of evidence, and the circumstances of the offence.

The criminal investigation body performs the above mentioned investigation in the presence of assistant witnesses, except for the case when this is impossible. The investigation is performed in the presence of the parties, when this is necessary. The parties' failure to come after having been informed does not impede the investigation.

The accused person or defendant who is held or arrested, if he/she cannot be brought to the investigation place, is informed by the criminal investigation body that he/she has the right to be represented and is ensured, if he/she requires it, representation. The court performs the field investigation after summoning the parties, in the presence of the prosecutor, when the latter's attendance in the trial is obligatory.

The criminal investigation body or the court may forbid the persons who are present or come to the place of investigation to communicate between them or with other persons, or to leave before the investigation is over.

The criminal investigation body or the court, if they find it necessary for checking on and clarification of some data, may perform a total or partial field reconstruction of the way and conditions in which the deed was committed.

If the procuring of evidence is proving to be difficult for the judicial body it has at his disposal the rogatory commission and delegation. When a criminal investigation body or the court cannot hear a witness, perform a field investigation, take away objects or perform any other procedural act, they may address another criminal investigation body or another court, who have the possibility to perform them.

Initiating the criminal action, taking preventive measures, approving the evidence gathering procedure, as well as ordering the other procedural acts or measures are not the object of the rogatory commission. The rogatory commission may only address a body or a court that are equal in rank. (article 132)

When the rogatory commission was ordered by the court, the parties may ask questions that will be communicated to the court which is to form the rogatory commission. At the same time, any of the parties may ask to be summoned when the rogatory commission is formed. When the defendant is under arrest, the court that will form the rogatory commission appoints an ex officio defender who will represent the defendant.

The criminal investigation body or the court may order, the performance of a procedural act by delegation as well. Only a hierarchically inferior body or court may be delegated. The dispositions regarding the rogatory commission are enforced accordingly in the case of delegation.

Analysis of Modifications in Romanian Legislation

With time the legislation in the matter of evidence has changed. Also the new Criminal Procedure Code brings about numerous modifications. The Law no. 202/2010 has modified article 91^6 regarding the verification of evidence.

If in the previous legislation these means of evidence could only be subject to a technical expertise, in the present, these can be the object of any kind of expertise destined to assure their conformity with reality.

Furthermore, by eliminating the restriction referring to the possibility of a technical expertise of the means of evidence and only this, the possibility of a complex evaluation of the information obtained through audio or video recordings arouse. [2]

The Law no. 135/2010 (the New Criminal Procedure Code) also introduces a few novelties in this domain.

The first novelty appears with the definition of means of evidence. This definition has not been changed much, but the necessity of the evidence contributing to the finding of the truth is outlined, as a general principle of the criminal trial.

Apart from the means of evidence regulated in the present Criminal Procedure Code, the legislator has introduced any other means of evidence which is not contrary to the law. Photographs have also been introduced as a specific means of evidence.

Article 98 of the New Criminal Procedural Code introduces a whole new topic, respectively the object of probation, this being the existence of a crime and it having been committed by the defendant; the deeds regarding civil responsibility, when a civil party exists; the facts and the factual circumstances on which the applicability of law is based; any circumstance necessary for the just solving of the cause.

The burden of proof is also modified. Unlike the present legislation which sets that the burden of proof pertains to the judicial body and the court in article 99 of the New C.P.C. it is clearly stated that the burden of proof pertains to the prosecutor, in a criminal case, and in a civil one to the civil part or to the prosecutor who exerts the civil action in the case when the injured party is without the capacity to exercise his/her rights of his capacity is diminished.

Also, it is stated that the suspect or the accused which is innocent until proven guilty, not being obliged to prove his innocence, also has the right not to contribute to his own prosecution. During the criminal trial the injured party, the suspect and the other parties have the right to propose to the judicial bodies the administration of evidence.

During the prosecution, the criminal investigation body gathers and administers evidence both in favor and against the suspect or accused, ex officio or at request. During the judgment, the court administers evidence at the request of the prosecutor, of the injured party or the other parties and, subsidiary, ex officio, when it considers it necessary for its own conviction.

The request regarding the administration of evidence formulated during the prosecution or during the judgment of the persons entitled is accepted or rejected by the judicial bodies.

The judicial bodies can reject such a request when: the means of evidence is not relevant; when the means of evidence already administered are considered sufficient; when the means of evidence is not necessary because the fact is notorious; the evidence is impossible to obtain, the request has been formulated by a person who is not entitled or the administration of evidence is contrary to the law.

The principle of loyalty of administration of evidence is also outlined in the New Criminal Procedure Code. Therefore, it is forbidden to use violence, threatening or other means of constraint as well as promises in the scope of obtaining evidence.

Tactics or methods of hearing the witnesses or parties which may affect a person's ability to remember or to consciously and voluntarily relate the facts, the interdiction applies even when the person gives his/her consent to be heard using such a method.

Also, it is forbidden for the judicial bodies or other persons who act on their behalf to provoke a person to commit or to continue to commit a criminal act in order to obtain new evidence.

[2] Zarafiu Andrei, "Legea nr. 202/2010. Procedură penală. Comentarii şi soluţii.", ed. C.H. Beck, Bucharest, 2011, p.45

The evidence which has been obtained through torture, as well as the evidence derived from this cannot be used during the criminal trial. Also, evidence which has been obtained illegally cannot be used in the criminal trial.

In exceptional cases, these dispositions do not apply if the means of evidence presents imperfections or procedural irregularities which do not produce a maleficence which cannot be removed without the exclusion of the evidence.

The derived evidence is excluded if it has been obtained directly from the illegal obtained evidence and could not be obtained in another way.

An article on the appreciation of evidence has also been introduced. The evidence does not a predefined value and is subject to the free appreciation of the judicial bodies after having evaluated all the evidence administered in the case.

In taking a decision regarding the existence of the crime and the guilt of the defendant the court decides with motivation, making references to all the evidence administered. A conviction is given only when the court is convinced beyond reasonable doubt. The decision of the court cannot be based solely on the testimony of the undercover agent or on the statements of the protected witnesses.

When a person gives statements his/her health should be taken into consideration. Concerning this aspect, the New Criminal Procedure Code stipulates that if during a hearing of a person, he/she accuses excessive tiredness or the symptoms of a disease which affects his/her physical or psychological capacity to participate at the hearing, then the judicial body must put a stop to the hearing and takes measures so that the person is consulted by a medic.

A series of incriminations are set in order to exclude the possibility of using of evidence obtained illegally. Thus, one can find in Title IV of the special part of the new Criminal Code the abusive investigation (the promise, threats or violence against a prosecuted or trailed person in a case made by a prosecuting body, a prosecutor or a judge in order to determine that person to make a statement or not, to make a false testimony or to withdraw his testimony), the inhuman treatment of the person (forcing a person to execute a penalty, security or educative measure in any other way than the one stipulated by law, forcing a person to degrading or inhuman treatment during the arrest, detention or the execution of a safety or educative measure or imprisonment), or torture (the act of the public officer who has an office which implies the exercise of the state authority, or of any other person who acts upon the instigation of or with express or tacit consent of a person, causing serious mental or physical sufferings to someone.). The New Criminal Procedure Code introduces elements of novelty which concern each means of evidence regarded individually. For example, articles have been introduced regarding the use of undercover investigators, supervised delivery, the identification of the number holder, the owner or the user of a telecommunication system or of an access point to an informatics system, the obtaining the list of the phone calls.

A disposition which has never even been mentioned in previous codes is included in the New Criminal Procedure Code is the photographing and the taking of the fingerprints of the suspect, the defendant or of other persons.

The judicial bodies may decide, that the suspect of defendant and other persons be photographed or fingerprinted, even without their consent, if there exists a suspicion that they have committed a crime, if they were present at the scene of the crime.

The judicial investigation body can authorize that a photograph of a person be made public, when this measure is necessary in order to establish his/her identity or, in other cases in which the publication of the photograph is important for the continuance of the criminal investigation in optimal conditions.

If it is necessary to identify the fingerprints which have left at the scene of the crime on certain objects or of the persons who can be put at the scene or who have a relation to the crime, the criminal investigation body may take the fingerprints of the persons who are supposed to have been

in contact with those objects, respectively photographing those who are believed to have any relation to the crime or who have been present at the scene of the crime.

Also, as an element of novelty, exhumation is introduced as a means of evidence, in the category of expertise. Exhumation can be disposed by the prosecutor or by the court in order to establish the cause of death, to help identify the body or any other elements which are needed for solving the case. The exhumation is done in the presence of the judicial investigation body.

The New Procedural Code outlines the special surveillance techniques. These are: the interception of communications and discussions; the access to an informatics system; audio, video surveillance or photographing; location and tracking through technical means; obtaining the list of telephone conversations; retaining and searching of the mail; solicitation and obtaining of data regarding financial transactions; the use of undercover investigators; supervised delivery, the identification of the number holder, the owner or the user of a telecommunication system or of an access point to an informatics system, the obtaining the list of the phone calls.

As jurisprudence, there is the Decision of the High Court, no. 199 from the 18th of February 2010. In this decision the court ascertained that from the time when the biological evidence had been taken and upon their analyses three days had passed. Thus, the legal dispositions had been breached (art. 6 (a) of the Order no. 376 of 10 April 2006 of the Minister of Health and article 14 (3) of the Order no. 376 of 10 April 2006 of the Minister of Health).

These dispositions state that biological samples taken must be submitted for processing immediately, being accepted that, in exceptional cases, it is carried out in maximum 3 days and only on condition of being kept in a refrigerator at a temperature between 0 and 4 degrees Celsius.

The Court also noted that the prosecution had failed to prove the alleged emergency situations that had caused delays in the transportation and deposition of the biological samples, thus exceeding the time allowed by the legal norm which guarantees the keeping of the biological samples unaltered and which ensures the correct outcome of the final report. Furthermore, it was not proven by any evidence, that the biological samples collected from the accused were kept under conditions imposed by the said legal disposition.

Conclusions

The outcome of a criminal relies mainly on the relevance of the evidence administered. It is not sufficient to administer only one piece of evidence, no matter if it consists of a statement, writing or surveillance, but it has to be corroborated with other means. Only the admission of guilt of the defendant can be sufficient in a criminal trial.

Administration of evidence which has been obtained through a method which is contrary to the law is considered to be a breach of national as well as European law. As regards to European law article 3, 6 and 8 ECHR that guarantee the right to a fair trial, to one's private life and the right to be protected against torture.

In the present, but especially in the New Criminal Procedure Code, there are articles which contain regulations against the use of illegal obtained evidence. This kind of evidence cannot be used during a criminal trial, nor can any other evidence derived from those obtained illegally, if it cannot be proved that the respective evidence could be obtained by other method which is legal.

The prosecutor must administer evidence both in favor and against the accused, without prejudice. The defendant does not have the obligation to prove his own innocence, the burden of proof falls upon the judicial bodies.

There are two principles which should be taken into consideration when the judicial bodies want to administer evidence. The principle of legality presupposes only the administration of the

means of evidence provided by law, under the conditions set by the Criminal Procedure Code, specialized legislation and the case law of the European Court of Human Rights.

The second principle is that of loyality which stipulates that use of violence, promising an illegal benefit, threatening with an unjust prejudice or using any other illegal constraining means for the purpose of gathering evidence are forbidden.

Also, any hearing methods or techniques that affect one's ability to remember or tell consciously and voluntarily the deeds that represent the object of the evidence shall not be used. Apart from respecting these two principles, general conditions of evidence cannot be drawn up due to the fact that every piece of evidence is unique both in content and in the method of how it is obtained. Therefore, the judicial bodies, in order to avoid any illegality, must, very attentively, analyze the conditions specific to each means of evidence.

To conclude, the illegal administration of evidence is and will continue to be severely sanctioned by the legislator. Excluding the evidence is a specific procedural sanction, applicable to the evidence administered by breaching the two principle presented above. A difference shall be made between this sanction and the annulment applied to most of the trial or procedural acts.

Excluding the evidence can be ordered if there is a substantial and significant infringement of a legal provision on administering the whole evidence which affects the whole outcome of the criminal trial.

References

- Neagu Ion, "Tratat de procedură penală. Parte specială.", editura Universul Juridic, Bucureşti, 2009
- Crişu Anastasiu, "Drept procesual penal", editura Hamangiu, Bucureşti, 2011
- Gheorghe Dumitru, "Drept procesual penal", editura Universul Juridic, Bucureşti, 2011
- Volonciu Nicolae, "Tratat de procedură penală. Parte specială", editura Paideia
- Theodoru Gheorghe, "Tratat de drept procesual penal", editura Hamangiu, 2008
- Zarafiu Andrei, "Procedură penală, Legea 202/2010. Comentarii şi soluţii", editura C.H. Beck, Bucureşti, 2011
- Dongoroz Vintilă, „Explicaţii teoretice ale Codului de procedură penală român", ed II, C.H. Beck, 2003, Bucureşti

THE NEW ROMANIAN CRIMINAL CODE – CHANGES SUGGESTED IN THE GENERAL PART

Mihai Adrian HOTCA*

Abstract

Through Law no. 286/2009, it was adopted a new Criminal code. The new Criminal code brings more changes both in the General part as well as in the Special part. Through this Criminal code, the Romanian lawgiver mainly pursued: to create a coherent legal framework from the criminal point of view by avoiding the useless overlapping of the norms in force existing in the current Criminal code and in the special laws; to facilitate the quick and unitary enforcement of the criminal legislation in the activity of the judicial organs; to transpose the regulations adopted at the European Union level into the national criminal legislative framework; to harmonize the Romanian criminal law with the systems of the other member states of the European Union. The study proposes to underline the main changes occurred in the General Part of the Criminal code.

Keywords: *Criminal code; Romanian criminal law, offence, punishment, justifying causes, immutability*

I. Introduction

The change of the legislation from the criminal point of view is, as in other domains, an issue that usually appears in the cases in which there are transformations of political, economic, social and cultural nature in the evolution of the society.

In the recitals that accompanied the draft of the new Criminal code, it was showed that the current sentencing regime regulated by the current Criminal code (come into force on January 1st 1969), submitted to some frequent legislative interventions on different institutions, led to a non-unitary enforcement and lack of coherence of the criminal law with repercussions on the efficiency and finality of the justice act[1].

Another argument invoked during the recitals points out to the necessity of placing the sentencing treatment within the normal limits, considering that the practice of the last decade proved that the efficient solution for fighting criminality was not the extreme increase of the punishment limits[2].

* Professor, Ph.D., Dean of the Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University, Bucharest, Romania (e-mail: mihaihotca@gmail.com).

[1] See www.just.ro.

[2] In the recitals, it is stipulated that during 2004-2006, about 80% of the punishments in the process of being enforced through prison punishment for theft and qualified theft were of at most 5 years of imprisonment which indicates that the courts of law did not consider necessary to apply the sanctions to the maximum upper limit stipulated by law (12 years in the case of a simple theft, 15 years, 18 years and 20 years in the case of the qualified theft respectively). On the other hand, the extremely wide range between the minimum limit and the maximum one of the punishment (from 1 to 12 years, from 3 to 15 years, from 4 to 18 years) led to more different solutions in practice with regard to the punishment applied for similar deeds or to greater punishments for infractions with a low injuriousness, which does not ensure the stipulated character of the justice act.

Nevertheless, through the new Criminal code, the lawgiver intended the simplification of the incrimination texts, the avoiding of the overlapping between various incriminations, as well as the overlapping of the special norms with the ones of the general part.

Finally, starting from the idea of ensuring the unity in the regulation of the offences, it was considered that it was necessary that some offences stipulated at present in the special criminal laws and that had a greater frequency in the judicial practice should be included in the content of the new Criminal code (information offences, road offences, etc.).

According to the recitals, the draft of the new Criminal code pursued the carrying out of the following targets:

- ❖ building a coherent legislative framework from the criminal point of view by avoiding the useless overlapping of the norms in force existing in the current Criminal code and in the special laws;
- ❖ simplifying the lawful regulations meant to facilitate their quick and unitary enforcement in the activity of the judicial organs;
- ❖ ensuring the complying with the exigencies resulting fundamental principals of the criminal law stipulated by the Constitution and by the pacts and treaties regarding the fundamental human rights to which Romania takes part;
- ❖ transposing the regulations adopted at the European Union level into the national criminal legislative framework;
- ❖ harmonizing the Romanian criminal law with the systems of the other member states of the European Union as a premise of the judicial cooperation from the criminal point of view based on mutual acknowledgment and trust.

Through Law no. 286/2009, the lawgiver adopted the draft of the new Criminal code that would come into force on a date set by thereof enforcement law (probably on March 1st 2013)[3].

Furthermore, we will present the main changes to the new Criminal code considering the provisions of the General part.

II. Analysis of the main changes existing in the General part of the new Criminal code[4]

1. Changes with regard to title I – *Criminal law and its enforcement limits*

Unlike the previous Criminal code, where it was dealt with in a single article, in the new Criminal code, the principle of the incrimination lawfulness and of the criminal law sanctions is „divided" into two articles: **incrimination lawfulness** (art. 1) and **criminal law sanctions** (art. 2). In the recitals, it is mentioned that the lawgiver pursued draw the attention on the consequences resulting from these rules – especially the forbiddance of the retroactive enforcement of the criminal law - both for the lawgiver and for the practitioner.

In art. 1 para. (2) of the new Criminal code, the content of art. 11 of the Criminal code in force appears slightly different. In art. 2 para. (2) and (3), there are the new provisions. According to art. 2 para. (2) of the new Criminal code: „*A punishment can not be applied or an educative measure or a safety measure can not be taken if this is not stipulated by the criminal law on the date when the deed*

[3] Law no. 286/2009 regarding the Criminal code was published in the Official Gazette no. 510 on 24.07.2009.

[4] For the analysis of the existing changes in the General part of the new criminal code, see the collective work *Explicații preliminare ale noului Cod penal*, Vol. I-II, coordinator George Antoniu, Universul Juridic Publishing House, Bucharest, 2011.

was committed". According to art. 2 para. (3): „*No punishment can be set and applied outside the general limits thereof*".

In relation to the criminal law enforcement, the lawgiver reversed the order of the two sections of chapter II, placing in the first section the norms regarding the criminal law enforcement in time and in the second one those regarding the criminal law enforcement in space.

The provisions regarding the more favorable criminal law enforcement during the criminal trial were completed with the provision of art. 5 para. (2) regarding the juridical regime of the unconstitutional normative acts (rejected or approved emergency ordinances with amendments), given that these continue to be applied to the juridical situations that are at the moment influenced by them to the extent they are obviously more favorable, although they cease their activity either entirely or partially.

Regarding the criminal law enforcement in transitory situations, the lawgiver opted for maintaining the compulsoriness rule of the more favorable criminal law incidence (art. 6) and for giving up the facultative enforcement of this law in the case of the definitive punishments, considering that this can not conciliate with the lawfulness principle.

We note here that art. 7 para. (2) of the new Code defines the expression of „*temporary criminal law*", unlike the previous regulation that does not contain such a definition. According to this text, **the temporary criminal law** is the criminal law that stipulates the date of its coming out of force or the enforcement of which is limited through the temporary nature of the situation that imposed its adoption.

Regarding the **territoriality principle of the criminal law**, besides the changes regarding the definitions of the expressions used within art. 8 of the new Criminal code that were posted in the same article, comparative to the technique used in the previous Criminal code that stipulates these definitions within the title reserved to the understanding of some terms and expressions, the lawgiver makes very important explanations.

It is the observations according to which the offence is considered committed on the territory of Romania also when an act of enforcement, instigation or complicity was committed or it even partially produced the result of the offence on this territory or on a ship under Romanian flag or on a ship registered in Romania.

For the incidence of the **personality principle of the criminal law,** it was introduced the **condition of the double incrimination,** but limited to the situation of the low and medium severity offences (at most 10 year prison punishment).

Regarding the **reality principle of the Romanian criminal law**, the lawgiver extended the incidence domain, including any offences committed abroad against the Romanian state, a Romanian citizen or a Romanian legal person.

The text designated for the **universality principle of the criminal law** was completely reformulated, considering that the current regulation has not been enforced in practice although it seems to offer an extremely wide competence to the Romanian juridical organs. The new content of the universality principle limits its enforcement exclusively to the situations when the interference of the Romanian criminal law is imposed in considering some internationally assumed engagements.

Finally, in the new Criminal code, it is regulated a new procedure, that is, the **delivery to an international tribunal**[5].

[5] For the analysis of the new texts that regulate the application of the criminal law in time and space, see George Antoniu, în *Explicații preliminare ale noului Cod penal*, Vol. I, page 21 and the following one. For a comparative approach of Criminal code in 1969 and Criminal code in 2009, see also Ilie Pascu, Petre Buneci, Noul Cod penal Partea generală şi Codul penal Partea generală în vigoare – Prezentare comparativă, Universul Juridic Publishing House, Bucharest, 2010.

2. Changes in the field of the offence institution

The new Romanian Criminal code also stipulates a general definition of the offence, but essentially different from the one in the Criminal code in 1969. According to art. 15 para. (1) of the new Criminal code: „*The offence is the deed stipulated by the criminal law committed with guilt, unjustified and imputable to the person that committed it*".

It is noticed that, besides the essential feature of the guilt and the deed stipulation in the criminal law, features that are found in the former definition, it has been added two more, that is: **antijuridicity** (unjustified character) and **imputability** (imputable character).

The unjustified character of the deed stipulated by the criminal law assumes that this is not allowed by the juridical order, being possible that a deed, although stipulated by the criminal law, should not be illicit because its committing is allowed by a legal norm. The causes that exclude the unjustified character of the deed are called **justifying causes** in the Criminal code. These are: self-defense, state of emergency, consent of the injured person and exercise of a right and carrying out of an obligation. Within the occidental theory and legislations, there is usually a demarcation between the two cause categories that determines the inexistence of the offence, that is: **justifying causes**[6] (based on the right of committing certain deeds called also objective causes of non- responsibility or that remove the unlawfulness or the illicit character of the deed) and **non- imputability causes** (called also non- culpability causes or subjective causes of non- responsibility – based on the lack of guilt).

The imputable character of the deed stipulated by the criminal law is achieved in all the situations when there is not a non- imputability cause. These are: physical constraint, moral constraint, irresponsibility, minor age of the doer, intoxication, error, non- imputable excess and fortuitous case.

The feature of the social danger lacks from the general definition of the offence because it was a useless one and at the same time specific to the Soviet inspiration legislations without connection to the traditions of our criminal law.

With regard to the **deed stipulation in the criminal law**, this assumes the requirement that the committed deed that is to be qualified as offence should correspond precisely to the description that the lawgiver makes in the incrimination norm.

Regarding the **guilt feature,** the lawgiver introduced in art. 16 para. (1) a provision without a correspondent in the Criminal code in force according to which the deed is an offence only if it was committed with the form of guilt required by the criminal law.

Another novelty is the provision of art. 16 para. (5) that defines the **oblique intent** (praeter intentionem) as a form of guilt. According to this norm, it is a case of oblique intent when the deed consisting of a deliberate action or inaction, causes a severe result that is owed to the doer's fault.

Finally, we state that the lawgiver unified the sentencing regime stipulated for the action and inaction committed with the same form of guilt. So, according to art. 16 para. (6), the deed consisting of an action or inaction is an offence when it is intentionally committed. The intentionally committed deed is an offence only if it is precisely stipulated by a law.

In art. 17 of the new Criminal code, the **offence by omission** is regulated as new in our criminal legislation.

According to art. 17 of the new Criminal code, the commissive offence that assumes the producing of a result is considered committed also by omission when:

[6] For more data regarding the justifying causes, see: George Antoniu, *Noul Cod penal*, C.H. Beck Publishing House, Bucharest, 2005, page 145 and the following one; Mariana Narcisa Teodosiu, *Cauzele justificative*, in R.D.P. no. 8/1998, page 109.

a) there is a legal or contracting obligation of taking action;

b) the author of the omission, through a previous action or inaction, created a state of jeopardy for the protected social value that eased the producing of the result.

The definition of the **attempt** was revised in the new Criminal code. In para. (1) of art. 32, the new Criminal code defines the attempt as the „*enforcement of the intent of committing the offence*", unlike the Criminal code in 1969 [art. 20 para. (1)], that defines the attempt as the „ *enforcement of the decision of committing the offence*".

Another change regards the cancellation of the provisions of art. 20 para. (2) of the former Criminal code, considering them as useless as long as the grounds of not producing the result in the case of the attempt have no relevance, being of any nature, but independent from the will of the doer in order to engage the criminal liability of this one.

Chapter V is properly entitled the „*unity and plurality of offences*", because, along with the norms that regulate the plurality of offences, there are also norms designated to set the juridical regime of two of the forms of the legal offence unity (complex offence and continuing offence).

The legal definition of the continuing offence was modified, being introduced a new condition, that is, the unity of passive subject.

Another change regards the definition of the complex offence where the expression „*as aggravated element or circumstance*" is replaced by the expression „*as constitutive element or as aggravated circumstantial element*", change required especially by the criminal doctrine.

The new Criminal code brought two necessary completions that it included in art. 37 para. (2) and (3). According to art. 37 para. (2), The complex offence is sanctioned with the punishment stipulated by law for that offence and according to art. 37 para. (3), the complex offence committed with oblique intent is sanctioned with the punishment stipulated by law for the consumed complex offence, if only the severer result of the secondary action was produced.

Regarding the main punishment enforced in case of **concurrence of offences**, the lawgiver opted for the absorption system, if life imprisonment was enforced for one of the concurrent offences, to the juridical plurality with an obligatory and fixed addition (of one third of the easy punishments) respectively, if only imprisonment punishments and fines were enforced for the concurrent offences.

As for the punishment of the concurrence, it was introduced a special provision that allows the court to be able to enforce life imprisonment in the case of having been committed more extremely severe deeds even if this one was not set for none of the concurrent offences.

Regarding the **recurrence** institution**,** we identify new elements both with regard to the definition and terms of the recurrence and with regard to the punishment. The temporary character of the recurrence is underlined when defining it. The terms of the recurrence were changed in the sense of increasing their limits.

Regarding the sentencing treatment of the recurrence, this one differs, being regulated the arithmetic addition in the case of post-sentencing recurrence and the increase of the special punishment limits with half in the case of the post- enforcement.

When the second term of the recurrence is made out of a concurrence of offences, it was set an algorithm of punishment enforcement difference from the existing one, enforcing first the provisions regarding the concurrence and then the ones incident in the case of the recurrence, system that is enforced even if only one of the concurrent offences are in a recurrence state, the rest being in intermediary plurality because the capacity of recidivist has to draw the treatment specific to this plurality form. As an exception as in the case of the concurrence of offences, it is stipulated the possibility of enforcing life imprisonment even if the set punishments consist in imprisonment when the number and severity of the committed deeds would justify it.

In Chapter VI, starting from the quality distinction that exists between the **doer** (co- doer) and the other **participants** (the doer directly commits the deed stipulated by the criminal law and the instigators and the accomplices intermediately commit the deed through the doer or co- doers), the new Criminal code stipulates distinctly the doer and the co- doers.

3. Changes with regard to the punishments

Regarding the new regulation of the punishment categories, this starts with the main punishments, continues to the accessory punishments and ends with the complementary punishments.

In the category of the complementary punishments, it was introduced a new punishment consisting in publishing the **final decision**.

In the new Criminal code, the **licence supervision** is no longer regulated in the chapter regarding the main punishments, but in the chapter regarding the punishment individualization, because, in practical terms, the licence supervision is an individualization form of the punishment.

The fine punishment has a new regulation, but also a significantly wider enforcement domain compared to the criminal code in force by increasing the number of the offences and their variants for which the fine can be enforced as sole punishment or as alternative punishment to the imprisonment punishment.

The calculation of the fine is made through the fine day system which, through the determination mechanism of the amount, is estimated that it ensures a better individualization of the punishment both in terms of proportionality expressed in number of fine days and in terms of efficiency by determining the value of a fine day by considering the patrimony obligations of the convict.

Another new element regards the introduction of the possibility of enforcing the **cumulative fine with imprisonment punishment** when the doer pursued to obtain patrimony assets through the committed offense. We believe that through this regulation, the lawgiver made a remarkable progress because the purpose of many offenders is to obtain material advantages.

Starting from the shortcomings of the previous regulation, which stipulates that the bad faith elusion of the convict from paying the fine leads to the replacement of the fine punishment to imprisonment only if the offense for which the sentence was delivered stipulates the fine punishment as an alternative to the imprisonment, the new Criminal code allows the **replacement of fine punishment** with the imprisonment punishment or of the enforcement of the fine punishment by providing community service.

The **accessory penalty** is regulated significantly different from the previous legislation in terms of both enforcement and content, as this accompanies the life imprisonment punishment or the imprisonment punishment.

With regard to the **complementary punishments**, the changes consist in reducing the maximum limit from 10 years to 5 years and in increasing the number of rights that are contained in this punishment. It was introduced in the content of the complementary punishment also a part of the sanctions that is at present in the safety measures, that is, the prohibition of being in certain localities, the expulsion of the foreigners and the prohibition of returning to the family home for a determined period of time, because these have a strong punitive character by their nature and mainly pursue to restrict the freedom of movement and only indirectly, because of this effect, it is achieved the elimination of the danger state and the prevention of committing new offences.

Another change regards the prohibition of exercising some rights, which is possible both besides the imprisonment punishment, regardless of its duration, and besides the fine punishment.

Other changes refer to the starting moment of the complementary punishment enforcement of prohibiting the exercise of some rights; two exceptions from the enforcement rule of this punishment

are set after the imprisonment punishment was carried out or considered carried out. It regards the conviction to fine punishment or, if it was ordered the measure of the conditional suspension of the sentence under supervision, the circumstances when the complementary punishment enforcement of prohibiting the exercise of some rights starts from its final decision.

Finally, it was introduced a new punishment, the publication of the final sentence in order to increase the efficiency of the justice act and to provide the moral repair to the victim.

The new Criminal code gives up to mention as individualization criteria the provisions of the general part and special part of the code, the causes that mitigate and aggravate criminal liability respectively, because these lead to the setting of the limits between which the judicial individualization will take place and know the specific regulations.

According to art. 74 para. (1), the setting of the punishment duration or quantum is made based on the **severity of the committed punishment and the offender's injuriousness** which is evaluated according to the following criteria:

a) circumstances and modality of committing the offence, as well as the used means;
b) state of danger created for the protected value;
c) nature and severity of the produced result or of other consequences of the offence;
d) ground of committing the offence and its purpose;
e) nature and frequency of the offences that are criminal records of the offender;
f) conduct after having committed the offence and during the criminal trial;
g) level of education, age, health, family and social status.

As for the **mitigating circumstances**, there are changes that regard the content of the mitigating circumstances and the effects of the mitigating circumstances. Under the aspect of the content, it was removed the circumstance regarding the good conduct behavior before having committed the offence and with regard to the effects, it was rethought their regulation under the aspect of the extent and determination modality of these effects.

The existence of the mitigating circumstances leads to the reduction by a 1/3 of the maximum and minimum special limit of the punishment stipulated by law. The reduction both of the minimum special limit and of the maximum one of the punishment gives the judge a greater consideration freedom in establishing the concrete punishment through the fact that it is no longer forced to lawfully enforce a punishment under the special minimum of the punishment, but it maintains this possibility to the extent the individualization operation leads to such a conclusion. At the same time, by reducing the special limits of the punishments with a fraction (1/3), it is achieved a proportional determination of the mitigating effect considering the abstract degree of danger set by the lawgiver for a certain offence.

Regarding the **content of the mitigating circumstances**, the lawgiver proceeded to a reevaluation of the circumstances that determined the worsening of the sentencing regime.

The aggravating circumstance regarding the committing of the offence due to low reasons was removed, because the committing of the offences is determined in most cases by immoral reasons and the content of this circumstance was never precisely delimited by the doctrine and jurisprudence.

In exchange, it was introduced a new aggravating circumstance consisting in **committing the offence by taking advantage of the obvious vulnerability state** of the injured person due to age, health, infirmity or other causes.

If there are aggravating circumstances, it can be enforced a punishment up to the special maximum. If the special maximum is not enough, in the case of the imprisonment, it can be added an addition of up to 2 years that can not exceed a third of this maximum and in the case of the fine, it can be added an addition of at most a third of the special maximum.

The new Criminal code regulates two institutions that have no correspondent in the previous Criminal code, that is, the giving up to the punishment and the postponing of the punishment enforcement.

The giving up to the punishment enforcement is the right of the court of not enforcing a punishment to a person that has committed an offence, considering the fact that it is enough for that person in order to improve to be enforced a warning because a punishment enforcement would risk to produce rather negative consequences than to contribute to the reeducation of the person in question.

The postponing of the punishment enforcement is the second new institution through which the punishment individualization can be achieved and consists in setting a punishment for a person that committed an offence, but which is not temporary executed if the set punishment is a fine or imprisonment of at most 2 years and the court considers that, based on the personal situation of the offender, the immediate enforcing of a punishment is not necessary, but it is imposed the surveillance of its conduct for a fixed period of 2 years, considering the persona of the offender and the conduct before and after having committed the offence.

The punishment enforcement suspension under supervision is the only individualization measure of the punishment execution of the three ones existing in the previous Criminal code (conditional remission of sentence, conditional remission of sentence under supervision and the punishment execution at the place of work), that was kept by the lawgiver.

The punishment enforcement suspension under supervision was reformed under more aspects that we will present further.

Thus, the carrying out of an unpaid job as community service is a characteristic that regards the punishment execution suspension under supervision because the obligation of carrying out such activity is set in charge of the convict, but only with its consent.

Another new element is that, in the new regulation, the punishment enforcement suspension under supervision does not cause the intervention of the lawful rehabilitation when the supervision term expires, but the rehabilitation will operate according to the common law and the term will derive from the reaching of the supervision term.

Starting from the idea of protecting the offence victims, the producing of the suspension effects is conditioned by the full carrying out of the civil obligations set through sentence, except for the case when the person proves that it had no possibility of carrying them out.

The regulation of the **licence supervision** institution is far different compared to the previous one; its changes regard the granting conditions and the social reintegration process of the convict through the active and qualified involvement of the state through probation councilors.

Under the aspect of the granting conditions, the lawgiver uniformed all the types of licence supervision (women, men, convictions for intentional and third degree offences, minors etc.). Thus, when granting the licence supervision, it is exclusively considered the conduct of the convict during the punishment execution (except for the persons over 60 years), considering that only in this way the conduct of the convict can be more efficiently influenced and shaped that gets an extra motivation knowing that a good behavior gets it closer to the release from prison.

4. Changes with regard to the safety measures

According to the new conception, the safety measures can be ordered including in the presence of a non- imputability cause, but not of a justifying cause.

The lawgiver, as we saw, passed a part of the safety measures to the complementary punishments. These are: prohibition of being in certain localities; prohibition of returning to the family home and the expulsion of the foreigners.

The reasoning of such a change regards the fact that such criminal law sanctions become incident in case of committing such deeds stipulated by the criminal law and due to their specific nature, it is necessary the completion of the direct repression expressed through the main punishment with differed secondary repression expressed in these complementary punishments[7].

Another new element is the reformulation of the content of the obligation to medical treatment and hospitalization.

5. Changes with regard to the criminal regime enforced to minors

According to the provisions of the new Criminal code, the only sanctions that can be taken against offending minors are the **educative measures** that can be divided into two categories: deprived and non- deprived of freedom.

The rule is that that the enforcement of the non- deprived of freedom educative measures [art. 116 para. (1)] has a priority because the deprived of freedom educative measures can be taken only in the case of severe offences or of those committed under the form of plurality of offences [art. 116 para.(2)].

The educative measure of the civil formation stage consists in the minor's obligation of taking part to an at most 4- month program in order to help him understand the legal and social consequences to which it exposes in the case of committing offences and in order to make it responsible with regard to its future behavior. The organizing, ensuring of the participation and supervision of the minor during the civic formation course are made under the coordination of the probation service without affecting the school or professional program of the minor.

The educative measure of the supervision consists in controlling and guiding the minor within its daily program for a period of time of two to 6 months, under the coordination of the probation service in order to ensure the participation to school classes or job formation classes and the prevention from carrying on some activities or coming into contact with certain persons that could affect the improvement program of this one.

The educative measure of the detention in weekends consists in the minor's obligation of not leaving the home during Saturdays and Sundays for a period of time of 4 to 12 weeks, except for the case that during this period, it has the obligation of taking part to some programs or of carrying on certain activities imposed by the court. The supervision is carried out under the coordination of the probation service.

The educative measure of the daily assistance consists in the minor's obligation of observing a program set by the probation service that contains the timetable and conditions of carrying on the activities, as well as the interdictions set to the minor. The educative measure of the daily assistance is taken for a period of time of 3 to 6 months and the supervision is carried out under the coordination of the probation service.

During the carrying out of the non- deprived of freedom educative measures, the court can impose the minor one or more obligations.

The educative measure of hospitalization in an educative center consists in the hospitalization of the minor in an institution specialized in minor recovery where it will attend a school preparation and job formation program suited for its skills, as well as social reintegration programs.

The educative measure of hospitalization in a detention center consists in the hospitalization of the minor in an institution specialized in minor recovery with a guard and surveillance regime where it will pursue intensive social reintegration programs, as well as school preparation and job formation programs suited for its skills.

[7] See recitals (www.just.ro).

6. Criminal liability of the legal person

Regarding the criminal liability of the legal person, it was maintained the principles contained in Law no. 278/2006, such as the direct liability of the legal person (assigned by the Belgian and Dutch law) and the necessity of the existence of a legal personality as premise for engaging the criminal liability of the collective entities.

According to art. 135 of the new Criminal code, the criminal liability of the legal person can be engaged by any natural person that acts under the conditions stipulated by the law and not just by the actions of the organs or thereof representatives.

The engaging of the criminal liability of a legal person is conditioned by the identification of a subjective element that can be different from the one found in the case of the natural person material author at least hypothetically.

Compared to the previous regulation, we note that the lawgiver operated the **restraining of the criminal immunity of the public institution** that carry on an activity that can not be the object of the private domain, this restraining to the offences committed in the carrying on of such activities.

The lawgiver brought changes also with regard to the individualization of the sanctions enforced to the legal person determined by the introduction of the fine day system.

The new Criminal code stipulates a new complementary punishment enforced to the legal person – **placement under supervision** that consists in the designation by the institution of a legal administrator or legal proxy that will supervise the carrying on of the activities that caused the committing of the offence for a period of time of one to 3 years.

7. Changes with regard to causes that eliminate the criminal liability

Title VII of the previous Criminal code was divided into three titles: Title VII "*Causes that eliminate the criminal liability*"; Title VIII "*Causes that eliminate or alter the sentence*" and Title IX "*Causes that eliminate the consequences of the conviction*".

When examining in comparison the provisions regarding the causes that eliminate the criminal liability, we consider that in the new Criminal code, it is mentioned with certain changes the previous provisions. Thus, in the text that regulates the **amnesty** [art. 152 para. (1)], the expression "*eliminates the criminal liability for the committed deed*" is replaced by the expression "*eliminates the criminal liability for the committed offence*";

It is also stipulated the date since when the prescription term of the criminal liability starts in the case of the offence and of the progressive one (since the date of committing the action or inaction and it is calculated based on the punishment corresponding to the definitive result).

8. Changes with regard to the causes that eliminate or alter the sentence

The provisions in this title are similar to the ones in the previous Criminal code, with two distinctions, the exclusion from pardon of the punishments the execution of which is suspended under supervision, except for the case when it is ordered differently through the pardon act and the breaking off of the prescription of the fine punishment execution if the obligation of paying the fine is replaced by the obligation of delivering an unpaid job for the community service.

9. Changes with regard to the causes that eliminate the consequences of the conviction

In this title, it is regulated the two rehabilitation forms: lawful rehabilitation and court rehabilitation.

With regard to the **lawful rehabilitation**, this one operates in the case of the fine punishment, imprisonment punishment that do not exceed 2 years or the imprisonment punishment the execution of which was suspended under supervision if the convict did not commit another offence within 3 years.

On the other hand, **the court rehabilitation terms** were reduced compared to the ones in the Criminal code in force. Thus, according to art. 166, the convict can be rehabilitated by the court, upon request, after reaching the following terms:

a) 4 years in the case of the conviction to an imprisonment punishment greater than 2 years, but that it does not exceed 5 years;

b) 5 years in the case of the conviction to an imprisonment punishment greater than 5 years, but that it does not exceed 10 years;

c) 7 years in the case of the conviction to an imprisonment punishment greater than 10 years or in the case of the life imprisonment punishment commuted or replaced by imprisonment punishment;

d) 10 years in the case of the conviction to life imprisonment punishment considered executed as a result of the pardon, reaching the prescription term of the punishment execution or licence suspension.

The convict deceased before reaching the rehabilitation term can be rehabilitated if the court considers that it deserves this benefit after having evaluated the behavior of the convict up to its death.

10. Changes existing within title X- ***Understanding of some terms or expressions in the criminal law***

Compared to the previous Criminal code, the new Criminal code brings certain amendments and completions. First, we note that some definitions were transferred from this title to others. It regards the expressions: „the territory of Romania", „offence committed on the territory of Romania".

Regarding the meaning of the notion of **crime law**, this was agreed with constitutional regulations in force. According to art. 173, by criminal law, it is understood any provision with criminal character included in organic laws, emergency ordinances or other legal acts which were acting as laws (laws, decrees of the former State Council, law-decrees) by the time of their adoption.

The notion of **public clerk** was reformulated. The new Criminal Code opted for the assimilation of the natural persons that carry out a profession of public interest that requires a special ability of the public authorities and that is subjected to their control (for instance, notaries and judicial executors) to public clerks.

The notion of family member in the new concept absorbs the notion of close relatives, including also persons who established bounds similar to those between spouses or between parents and children on condition of living together.

The content of title X was completed with more definitions that are not found in the old Criminal code and that are used in regulating some offences taken from the special legislation (information system, exploitation of a person and electronic payment instrument).

III. Conclusions

Based on the above analysis, we can notice that the new Criminal code brings numerous changes within the institutions of the General part. Some of the changes operated by the lawgiver are

meant to improve certain legal deficiencies that were encountered in practice. For instance, with regard to the causes of inexistence of the infraction (consent of the injured person, exercise of a right or carrying out of an obligation) or with regard to the forms of the legal unity of the offence.

Other changes were brought in order to stop certain controversies existing in the specialty doctrine of in the juridical practice. For example, with regard to the content of some circumstances (low reasons, conduct of the offender, etc.) or of the institution of the deed that does not have the social danger degree of an offence.

On the other hand, we notice that certain changes of the General part of the new Criminal Code reflect a change of the criminal policy of the Romanian state. We note here the sentencing regime of the offense plurality, the general definition of the offense, the criminal law application over the time, sanctions regime or the regime applicable to juvenile offenders, the enforcement of the criminal law in time, the punishment regime or the regime enforced to the minor offenders.

Only time will tell if the General part of the new Criminal code is or is not a step forward from a legislative point of view.

References

- George Antoniu, Noul Criminal code, C.H. Beck Publishing House, Bucharest, 2005;
- Mariana Narcisa Teodosiu, Cauzele justificative, in R.D.P. no. 8/1998;
- George Antoniu (coordinator) Explicații preliminare ale noului Criminal code, Vol. I and Vol. II.
- Ilie Pascu, Petre Buneci, Noul Criminal code Partea generală şi Criminal code Partea generală în vigoare – Prezentare comparativă, Universul Juridic Publishing House, Bucharest, 2010;
- Mihai Adrian Hotca, Noul Criminal code şi Criminal code anterior. Aspecte diferențiale şi situații tranzitorii, Bucharest, Hamangiu Publishing House, 2009;

VIOLATING THE RIGHT TO PRIVATE LIFE UNDER THE NEW ROMANIAN PENAL CODE

Mirela GORUNESCU[*]

Abstract

It is more and more difficult nowadays that the private life of a person to remain out of other people intervention and out of public visibility. In this context, the present paper is concentrated of a new criminalization included in The New Romanian Penal Code - article 226 from this law. It is about the violation to the right to private life which is for the first time incriminated by the Romanian Penal Code.

Keywords: *private life protection, criminal liability, The New Romanian Penal Code, crime*

Introduction

1. This study focuses on the new legal framework concerning the private life penal protection, as it results from the New Romanian Penal Code. It is well known that, nowadays it is more and more difficult nowadays that the private life of a person to remain out of other people intervention and out of public visibility. That is why the Romanian legislator felt the need to create a special chapter dedicated to the facts which violate the domicile and the private life.

2. From our point of view it is very important for all the actors involved in applying the penal law to correctly understand the law, because this is the indispensable premise for a correct application in particular cases. That is why the present study aims to analyze the constitutive elements of the offence incriminated by the article 226 New Romanian Penal Code and to explain them in accordance to some settlements of the European Court of Human Rights.

3. We will use the monographic analyze method to reveal the main elements of the crime of private life violation. Also, the study will focus on the way the European Court of Human Rights case decisions influenced the new criminalization. Moreover, we will put the new offence in the larger framework created by the legal rules included in the Chapter IX from the Title dedicated to the crimes against the person from the special part of the New Romanian Penal Code.

4. In terms of the Romanian doctrine in the field of interest, the present study has the merit to be among the first studies ever published on this topic. At national level it was already observed that the European Court of Human Rights pays a special attention to the domicile and private life protection. An important number of decisions of the European judicial institution were given in this domain and realized a large concept of private life, which cannot remain out of penal law protection. The Romanian legislator accepted in 2009 this perspective.

[*] Associate Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (email: mire_gor@yahoo.com).

A new penal code and a new conception on private life protection.

In June 2009, the Romanian Parliament adopted the Law no. 289 concerning the New Romanian Penal Code[1] which is about to enter into force in short time[2]. This new law abolished the Law no. 301 from 2004[3] concerning a former project of penal code, and the Law no. 294 from 2004 on execution of punishments and measures ordered by the court in criminal proceedings[4], two normative acts which have never been intro force[5]. In this way, it is possible for Romania to have in a short time a new Penal Code, a modern one, adapted to the need to combat more efficient the nowadays antisocial behaviours.

The new code was elaborated in a period during which Romania was the subject of several condemnation in cases brought in front of European Court of Human Rights by its` nationals. That is why the Romanian legislator made consistent efforts to adapt the new code to the European standards. This effort manifested also in the field of private life protection.

A clear proof of this effort is the fact that in this legal instrument there is a special chapter dedicated to the offences against the private life. This chapter has no correspondent in The Penal Code which is into force since 1969, but has in its content both new offences definitions (the violation of professional office) and definitions of some traditional offences (the violation of the domicile).

In the legislator's new conception, a special chapter is needed in order to assure better protection for this important social value. In this way, the importance of the value will be stressed and all the society will receive the right message.

In this chapter, there are four articles which refer to crimes traditionally known by the Romanian legislation: the violation of the domicile (article 224 New Romanian Penal Code), the disclosure of the professional secret (article 227 the New Romanian Penal Code), but also, to crimes defined for the first time in our legislation: the violation of the professional office (article 225 New Romanian Penal Code) and the violation of the private life (article 226 New Romanian Penal Code).

The social value protected by all these legal norms is represented, according to the doctrine, by all the social relations which refer to the people's intimacy ant to the right to have a normal life, with the respect of private life against the acts that could endanger it[6].

The right to private life from the european court of human rights perspective.

According to the article 8 from The European Convention of Human Rights:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

---

[1] Published in the Romanian Official Journal, First Part, no. 510 from 24 June 2009.

[2] According to article 446 from this law, the new code will enter into force at a moment to be indicated by a law which will be especially adopted to rule the entering into force of the code. Until now, this law is still a draft.

[3] Published in Romanian Official Journal, First Part, no. 575 from 29 of July 2004.

[4] Published in Romanian Official Journal, First Part, no. 591 from 1st of July 2004.

[5] This technique was possible due to the modification of Law no. 24 from 2004 concerning the legislative technique rules (published in Romanian Official Journal, First Part, no. 777 from 25 August 2004 – by the Urgent Ordinance of the Govern no. 61from 2009 - published in Romanian Official Journal, First Part, no. 390 from 9 June 2009). According to a new text, under article 1^1, a normative act may be modified and even abolished before the moment of entering into force. So, the Law 301 from 2004 is not and never were the active Romanian Penal Code, even some electronic documentation sources indicate it in this position – ex. http://legislationline.org/ documents/section/criminal-codes.

[6] V. Dobrinoiu, N. Neagu, Drept penal, Partea specială, Editura Wolters Kluvert, Bucureşti, 2011, p. 176.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

As observed, the Article 8, in the first part, paragraph 1, sets out the precise rights which are to be guaranteed to an individual by the State – the right to respect for private life, family life, home and correspondence. In its second part, the Article 8 paragraph 2 makes it clear that those rights are not absolute in that it may be acceptable for public authorities to interfere with the Article 8 rights in certain circumstances. These must be only interferences which are in accordance with law and necessary in a democratic society in pursuit of one or more of the legitimate aims listed in Article 8 paragraph 2 will be considered to be an acceptable limitation by the State of an individual's Article 8 rights[7].

In the doctrine it is observed that, concerning this article, that The Court has held that, given the fundamental nature of the Convention rights, the first paragraph should be widely interpreted, and the second one narrowly. Rights must therefore be "stretched", and limitations limited. Also, individuals need only show that there was an interference with a right protected by the Convention in their case; the State then bears the onus to prove that that interference was lawful and justified in Convention terms.[8]

As it concerns the definition of the private life, as a social value, protected by the penal law, according to the European Court, this is a broad concept which is incapable of exhaustive definition[9]. The only consensus which exists is that the concept is clearly wider than the right to privacy, however, and it concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality. In a particular decision, the European Court stated that it would be too restrictive to limit the notion of private life to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings[10].

It is said that the 8th article of the European Convention of Human Rights is only the first text from a series of four articles which protect rights meaning the social respect due to the individual[11]. In this series are included: the right to the private life and to a family life, the right to domicile and to correspondence (article 8), the right to the freedom of thought, conscience and religion (article 9), the freedom expression, and to information (article 10) and the freedom of association (article 11).

In this context, it is accepted by the doctrine that the respect for the private life is a complex right, with multiple aspects, as it results from the European Court of Human Rights jurisprudence. It includes, for instance, the privacy (the private life secrecy), the right to a personal identity and, as a new come, the right to a healthy natural environment[12].

---

[7] Ursula Kilkelly, The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights, http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf

[8] Douwe Korff, The Standard Approach under Articles 8 – 11 ECHR and Article 2 ECHR, http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf

[9] Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, para. 36.

10 Niemietz v. Germany, judgment of 16 December 1992. 11 Appl. No. 8257.

[11] Corneliu Bârsan, Convenția europeană a drepturilor omului, Comentariu pe articole, Editura C.H. Beck, București, 2005, pag. 593.

[12] Bianca Selejan-Guțan, Protecția europeană a drepturilor omului, Editura C.H. Beck, Bucureşti, 2004, p. 150.

The first component refers to the private life secrecy, as a right to live protected from the foreign eyes, as a right to be left alone. This right includes also the protection of the domicile, as the space the private life takes place. Under this prerogative enters the private opinion secrecy, protected against the correspondence secret violations or against any modern investigation methods authorities might use: tapping, creation and communication of personal data files, storing and using data without person's accord[13].

The protection is extended over the particulars' intrusions and that is why the state has the duty to prevent and to punish the abusive behaviours by a strict legal regulation of the private detectives and journalists' responsibility.

The absence of protection against press intrusions or the disclosure in the media of highly intimate, non-defamatory details of private life has not yet been subject to significant challenge in European Court of Human Rights jurisprudence. Some complaints have been declared inadmissible for failing to exhaust domestic remedies[14]. Determination of whether issues might arise under private life in relation to press intrusion might be influenced by the extent to which the person concerned courted attention, the nature and degree of the intrusion into the private sphere and the ability of diverse domestic remedies to provide effective and adequate redress.

This is the component the Romanian legislator from 2009 chose to protect by criminalizing the facts described by the article 226 from The New Romanian Penal Code.

The Private Life Violation Under The New Romanian Penal Code

Under all these influences, in the article 226, the New Romanian Penal Code incriminates for the first time in Romania, the private life violation. The offence consist, in its basic form, in a behaviour of a person who affects the private life of a person, without legal justification, by photography, by capturing or recording images, by listening with technical instruments or by tapping a private conversation held in a house, in a room. In a close relationship with this first form, the second paragraph of the article 226 of the Romanian New Penal Code states that represent an even more serious offence these facts: the unlawful disclosure, dissemination, presentation or transmission of sounds, conversations or images provided in the first paragraph to another person or to the public.

According to paragraph 5 from the article 226, represents an offence even the fact to place without an authorization technical devices to audio or video tapping, in order to commit the private life violation.

According to the Romanian doctrine, the norm from the article 226 New Romanian Code respond to a necessity to prevent the unlawful use by the press, by any person or by some specialized authorities of modern technical recording instruments in order to tape private conversation and to interfere with the victim 's right to privacy[15]. In the same time, it is observed that the new criminalization is formulated in a manner which allows the press to fulfil its role in a democratic society, and to realize a correct equilibrium between the right to private life and the freedom of expression[16].

[13] Leaner v Suedia Case, 1987.

[14] Case no. 18760/91 v. Ireland, 1993; Case no. 28851/95 and 28852/95, Spencer v. the United Kingdom, 1998.

[15] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 247.

[16] V. Dobrinoiu, N. Neagu, op. cit., p. 175-176.

That is because the legal text itself, in the paragraph (4), indicates four causes to justify the facts described by the rest of the provisions. In these cases the fact will lose its unlawful character: the author participated to a conversation with the victim and taped the sounds, the images or the conversation in this occasion, having a legal interest to do this; the victim explicitly acted in a way to make her (him) seen or heard by the author; when the author tapes a person committing a crime or proves an offence; when the author tapes public interest information, and their divulgation brings more important advantages than the prejudice created for the individual.

The criminal law specialists[17] have already expressed their concern about this last hypothesis, because it will be impossible as in concrete situations to determine when the prejudice produced by the divulgation act is less important than the prejudice for the private life. That is because often this prejudice has a moral nature, which makes it impossible to quantify.

Such an offence might be committed in the future by a private detective hired by a jealous wife who uses technical recording at distance instruments to tape images or conversations the husband has with his mistress in her home[18].

Because of the way the legal text is formulated, there are already disputes in the doctrine concerning the incriminated behaviour. For instance, in one opinion, this element is represented by the „private life perturbation", seen as any action which facilitates by all means a direct contact with someone's private life[19]. In another opinion, the illegal behaviour consists from facts such as shooting, capturing or recording images, listening with technical instruments or tapping a private conversation held in a house, in a room[20]. We agree this second opinion, because the private life perturbation is the result which the offence produces and not the interdicted behavior.

There are some essential conditions to be met in order to establish the offence was committed. Firstly, it is necessary to see that all the acts described by the law were committed without having a valid legal order to allow them, or, without having the victim's consent. This special condition takes into account the fact that, under some particular circumstances, it is possible for the judicial authorities to tape the sounds, the conversations or the images without breaking the law. For instance, according to the article 138 from the New Romanian Penal Procedural Code, during the investigations may be used some special survey techniques. Among these techniques there are: the interception of conversations and communications, the access to a computer, the video, audio photo survey, the localisation or the taking of a person, getting the phone calls listing, etc. So, it is possible to conduct all this activities without committing the offence defined by the article 226 from the New Romanian Penal Code. But, in order to remain in the legal framework, all the conditions imposed by the law must be respected. For instance, according to the article 140 from this legal instrument, the technical survey is possible only after the judge for rights and liberties authorises it. In special cases, the prosecutor has also this possibility, but only for a short duration (48 hours).

Secondly, in the assimilated modality, it is necessary to observe that the offender disseminated the sounds, the conversations or the images to other people or to the public. In the doctrine it is opinionated that, in this modality, when the person keeps the sounds, the conversations or the images for himself, the offences defined by the article 226 paragraph 2 the New Romanian Penal Code cannot be committed[21].

[17] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 254.
[18] V. Dobrinoiu, N. Neagu, op. cit., p. 176.
[19] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 251.
[20] V. Dobrinoiu, N. Neagu, op. cit., p. 176.
[21] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 253.

Defined as we have seen, the private life violation offence from the article 226 of the New Romanian Penal Code has a modern content, in accordance with the legal texts from other European countries legislation.

For instance, the Penal Code of Spain, in the first chapter from the 10th title defines „The offences against the intimacy, the right to a personal image and the right to the privacy of the domicile". According to the article 197.1 from this chapter, a person will be punished for facts committed in order to discover someone's secrets or to affect someone's private life, without the victim's consent will use personal documents, letters, postal messages, electronic postal messages, or intercepts he victim's communications or uses interception, transmission, tapping technical instruments.

In the same way, the Italian Penal Code regulates, in the article 615 bis, the offence of illicit interference with someone's private life. According to this text, anyone who, using audio or video taping devices gets in unlawful way information or images which affect someone's private life will be punished under this legal text.

Conclusions

1. The present paper has as a starting point the Romanian legislator's decision to include under the penal law protection a new area – the private life.

The decision was taken under the influence of some European Court of Human Rights decisions. Moreover, the social value protected by the legal norms from this chapter is defined not by the national legislation, but by the European judicial institution decisions. The new offence is about to become effective in particular situations (once the New Romanian Penal Code will enter into force). That is why the present paper analyzed its particularities in order to facilitate a better understanding of the new legal text.

2. This study represents a documentation source for every person interested in criminal law field, both theorists and practitioners. The impact on the doctrine will be an important one because there are only a few such studies published in Romania, which reveal the specific elements of a new offence incriminated by The New Romanian Penal Code – the private life violation. Also, the paper has the merit to include an analysis of the way the European Court of Human Rights jurisprudence has influenced the definition included in the article 226 from The New Romanian Penal Code.

The study will be interesting for the practitioners in order to have a doctrinal guidance when the new law will enter into force. In this way, the text will be better understood and better applied.

3. This study opens the perspective for future researches related to this topic. It is about a new domain included under the influence of the Romanian penal law and that is why such future studies should concern some particular aspects of the right to private life and the way penal law succeeds in creating effective guaranties for their protection. It might be interesting to observe the component of the right to a healthy natural environment and the way that the penal legislation protects it. A subject like this is interesting from the both theoretical and practical perspective as well.

References

- V. Dobrinoiu, N. Neagu, Criminal Law, Special Part, Wolters Kluvert P.H., Bucharest, 2011.
- Ursula Kilkelly, The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights, http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf
- Douwe Korff, The Standard Approach under Articles 8 – 11 ECHR and Article 2 ECHR, http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf
- Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, para. 36.
- Corneliu Bârsan, European Convention of Human Rights, C.H. Beck P.H., Bucharest, 2005, pag. 593.
- Bianca Selejan-Guțan, European Protection of Human Rights, C.H. Beck P.H., Bucharest, 2004.
- P. Dungan, T. Medeanu, V. Paşca, Criminal Law, Special Part, Universul Juridic P.H., Bucharest 2010.

GROWTH OF COLLECTIVE INTELLIGENCE BY LINKING KNOWLEDGE WORKERS THROUGH SOCIAL MEDIA

Jaroslava KUBÁTOVÁ*

Abstract

Collective intelligence can be defined, very broadly, as groups of individuals that do things collectively, and that seem to be intelligent. Collective intelligence has existed for ages. Families, tribes, companies, countries, etc., are all groups of individuals doing things collectively, and that seem to be intelligent. However, over the past two decades, the rise of the Internet has given upturn to new types of collective intelligence. Companies can take advantage from the so-called Web-enabled collective intelligence. Web-enabled collective intelligence is based on linking knowledge workers through social media. That means that companies can hire geographically dispersed knowledge workers and create so-called virtual teams of these knowledge workers (members of the virtual teams are connected only via the Internet and do not meet face to face). By providing an online social network, the companies can achieve significant growth of collective intelligence. But to create and use an online social network within a company in a really efficient way, the managers need to have a deep understanding of how such a system works.Thus the purpose of this paper is to share the knowledge about effective use of social networks in companies. The main objectives of this paper are as follows: to introduce some good practices of the use of social media in companies, to analyze these practices and to generalize recommendations for a successful introduction and use of social media to increase collective intelligence of a company.

Keywords: *collective intelligence, social media, knowledge, management, virtual team.*

Introduction

This paper deals with collective intelligence in the era of Internet-based social media. This topic is worth our attention because if the company is able to use the potential of collective intelligence appropriately, it can achieve a strong competitive advantage. Collective intelligence can also be used for public benefit. In this paper we have tried to establish if there are some general rules how to use collective intelligence in favor of a certain project. The phenomenon of web-based collective intelligence is relatively new. The best theoretical background for this topic is created by the MIT Center for Collective Intelligence. The background publications on the subject of web-based collective intelligence are: *Inventing the Organizations of the 21st Century* by Thomas W. Malone, Robert Laubacher, and Michael S. Scott Morton,[1] *The Future of Work* by Thomas W. Malone,[2] *Democratizing Innovation* by Eric von Hippel,[3] or *Organizing Business Knowledge: The MIT*

* Associate Professor, Ph.D., Philosophical Faculty, Palacký University in Olomouc, Czech Republic (email: jaroslava.kubatova@upol.cz).

[1] Thomas W. Malone, Robert Laubacher, and Michael S. Scott Morton, *Inventing the Organizations of the 21st Century* (Cambridge, MA: MIT Press, 2003).

[2] Thomas W Malone, *The future of work: how the new order of business will shape your organization, your management style and your life* (Boston: Harvard Business Press 2004).

[3] Eric von Hippel, *Democratizing Innovation* (Cambridge, MA: MIT Press, 2005).

Process Handbook by Thomas W. Malone, Kevin Crowston, and George A. Herman[4]. The MIT Center for Collective Intelligence publishes working papers presenting the results of its research. These working papers are available at the website of the MIT Center for Collective Intelligence.[5] Some papers are also published in scientific journals such as MitSloan Management Review. To achieve our aim, i.e. to find some general guideline how to create a successful web-based collective intelligence network, we have analyzed six successful cases of the growth of collective intelligence and compared the concrete characteristics of the project with some general recommendations of the MIT Center for Collective Intelligence.

Collective intelligence has existed for as long as humans have. However, this traditional phenomenon is nowadays occurring in entirely new forms. Thanks to modern information and communication technologies (ICTs), particularly the Internet and Internet-based social media, large numbers of people around the world can work together in ways that were never possible before.[6] This possibility is a great opportunity but also a great challenge for the companies. The opportunity is strengthened by the fact that we live in the knowledge society and knowledge economy. That means that a growing ratio of products is based on knowledge and knowledge workers and their human capital are the most valuable sources of the companies which employ them. Since knowledge is intangible, it can be, at least in its explicit form, shared through ICTs. The companies can gather virtual teams of workers without having to take into account their geographical location, because the team members can communicate and cooperate via ICTs. Moreover, present-day companies can use collective intelligence of the crowd and take advantage of its collective intelligence. The crowd can be composed of employees, customers, experts, by the general public, etc. Thus, it is very important for the management of the companies to profoundly understand collective intelligence so the company can create and take advantage of these new possibilities.

Collective intelligence and Social Media

Not surprisingly, there are many definitions of collective intelligence. For the purposes of this paper we can use the definition by the MIT Center for collective intelligence. The experts from this center define collective intelligence as "Group(s) of individuals doing things collectively that seem intelligent."[7] Collective intelligence refers to harnessing the power of a large number of people to deal with a problem as a group. The idea is that a group of people can solve problems more efficiently and offer greater insight and a better answer than any one individual could provide. As mentioned above, these people can now cooperate via Internet-based social media. Social media refers to the ICT platforms designed for real-time social interaction.[8] The examples are wikis, discussion forums or blogs. Many platforms are available on public websites and are very popular, e.g. Facebook or LinkedIn. The companies can use also private sites, e.g. Jive, Yammer, Socialcast. Some of the platforms enable creating information and interaction for general audience, e g. Facebook, some are more specialized, e.g. LinkedIn enable professionals to create and share

[4] Thomas W. Malone, Kevin Crowston, and George A. Herman, *Organizing Business Knowledge: The MIT Process Handbook* (Cambridge, MA: MIT Press, 2003).

[5] "MIT Centre for Collective Intelligence – Publications", accessed November 19, 2011, http://cci.mit.edu/publications/index.html.

[6] Malone, *The future of work*.

[7] "Handbook of Collective Intelligence", accessed January 10, 2012, http://scripts.mit.edu/~cci/HCI/index.php?title=What_is_collective_intelligence%3F.

[8] Rafiq Dossani, *Social Media and the Future of Business*, accessed October 5, 2011, http://www.wipro.com/Documents/insights/SOCIAL-MEDIA.PDF.

professional profiles and create professional networks. Enterprise social networks usually contain wikis, discussion forums, blogs, or enable sharing text and other files.

The managerial questions arise: Why should be the use of Internet-based social media efficient? Should the companies change the way of decision making and take into account the views of the crowd? And what are the key issues when designing collective intelligence platforms? Actually, these questions represent only a small part of the problems which the managers now have to solve. It is obvious, that current management models used in many organizations are obsolete, because they are based on bureaucratic hierarchies, on control and specialization and do not address the way knowledge workers work best. New innovative management practices must be implemented. Management innovation is the most challenging innovation which the organizations have to go through, but it is also the most enduring source of business innovation.[9]

While making decisions, current hypercompetitive and fast-paced business requires very broad exploration of potential opportunities, accurate responses and short response times – all that at once. Thanks to the Internet and other ICTs we have access to data, but we have to explore the data, find the opportunities and finally make decisions. Unfortunately, as individual decision makers, we have certain limitations. It seems that our brain is not well equipped to deal with so many business problems of this day in an effective way.[10] The solution can be to use collective intelligence of others. Thanks to currently available ICTs it is not a problem to involve a large group of people in the decision-making process. However, "the wisdom of crowds" in corporate decision making can only be used if the managers are able to assess whether in a given case the use of collective intelligence is appropriate, possible and under what conditions.

Decision making is the essence of management. To make a decision to solve a problem the managers actually have a two-level task. First, they have to generate different alternatives of problem solution and second, they have to evaluate these alternatives and chose the optimum one as a solution to the problem. During the decision making process the individual can fall into several traps.[11] The most common traps are

- Anchoring trap – the propensity to give a disproportionate weight to the first information the decision maker receives
- Status quo – the tendency to stick to the status quo
- Sunk costs – the predisposition to continue an endeavor once an investment in the form of money, effort, or time has been made
- Framing trap – the propensity to be influenced by different reference points
- False assumptions – the proclivity to assume something is true without evidence to support it
- Missed signals – the penchant to ignore warning signs
- Competition trap – the urge to win during a competitive challenge that blinds decision makers from seeing reality clearly

Collective intelligence can help mitigate the effects of these traps by bringing the diversity of viewpoints into the decision making process. Thanks to the use of the Internet and its specialized sites the companies can seek advice from the crowd.

---

[9] Gary Hamel, "The Management 2.0 Challenge. How Will You Reinvent Management in Your Organization?" *Harvard Business Review*, July 28, 2011.

[10] Eric Bonabeau, "Decisions 2.0: The Power of Collective Intelligence," *MIT Sloan Management Review.* (Winter 2009): 45-52.

[11] John S. Hammond, Ralph L. Keeney and Howard Raiffa, "The Hidden Traps in Decision-Making," *Harvard Business Review* (January 2006): 118-126.

Examples of successful growth of collective intelligence

In this part of the paper we have provide some examples of successful use of social media in favor of the growth of collective intelligence. Actually, it is a problem to claim that collective intelligence of a certain group of people is on a certain level or that it is increasing. Nevertheless, we can feel that if people create such a big thing such as e.g. Wikipedia, the new value or public knowledge arises. The MIT Center for Collective Intelligence examines the possibilities of measuring collective intelligence but there are no results yet.[12] However, if we extend the mentioned definition of collective intelligence we can assess if there is a growth of collective intelligence in the examples provided below. We have stated that collective intelligence can be defined as a group of individuals doing things collectively that seem intelligent. We can add that the group addresses new or trying situations and that the group applies knowledge to adapt to a changing environment.[13] Thus, if we can see that these assumptions are fulfilled successfully, we can conclude that collective intelligence is growing. The first three examples are focused on public networking, the other three examples are focused on private corporate networks.

Wikipedia

The famous example of collective intelligence is Wikipedia (www.wikipedia.org). Wikipedia is a multilingual, web-based, free-content encyclopedia project based on an openly editable model. Wikipedia is written collaboratively by largely anonymous volunteers. Anyone with Internet access can write and make changes to Wikipedia articles. Since its creation in 2001, Wikipedia has grown rapidly into one of the largest reference websites, attracting 400 million unique visitors monthly. There are more than 82,000 active contributors working on more than 19,000,000 articles in more than 270 languages. Contributions cannot damage Wikipedia because the software allows easy reversal of mistakes and many experienced editors are watching to help and ensure that the edits are cumulative improvements.[14]

Stack Exchange

Stack Exchange (www.stackexchange.com) is a very interesting example of collective intelligence. Stack Exchange is a fast-growing network of nearly 80 question and answer sites on diverse topics from software programming to cooking. It is an expert knowledge exchange site. After someone asks a question, members of the community propose answers. Others vote on those answers. Very quickly, the answers with the most votes rise to the top. The questions and answers on Stack Exchange can be edited by anyone. The site is free and open to everyone. Registration is not necessary; however, registered users can collect reputation points when people vote up his/her answers. It means that Stack Exchange focuses on solution proposals and also on solution evaluation. Everything is done publicly.

[12] "Measuring collective intelligence" accessed January 12, 2012, http://cci.mit.edu/research/measuring.html.
[13] "Handbook of Collective Intelligence".
[14] "Wikipedia: About", accessed December 10, 2011, http://en.wikipedia.org/wiki/Wikipedia:About.

InnoCentive

A more business-oriented but still public example is the web site InnoCentive, through which companies can post their problems (challenges) and solicit solutions. The winning solution receives a cash award.

Social networking in NASA

NASA is the first example from the corporate segment. They started social networking in 2008 claiming that new ideas and new solutions for their complex missions require input from a geographically dispersed community of knowledge workers. By providing an on-line social network, NASA created a collective intelligence and learning community for its knowledge workers.[15] According to NASA on-line networking accelerates communication and problem solving, captures an individual knowledge worker's know-how for reuse by many, creates peer-to-peer communication in context and deepens the understanding for decision making. Currently NASA is still developing its social media-based networking. For internal communication, NASA uses Yammer and some of the employees use ExplorerNet – an internal social networking tool.[16] Each user of ExplorerNet has an individual profile with contact information, they can add information about their expertise, past and current project, etc. Each user is also given his/her own blog, wiki and discussion space. Communities are another component of ExplorerNet. The communities have wikis, discussion forums, community blog, polling and some project management functionality. Anyone can create a community at any time for any purpose. The communities can easily cooperate as virtual teams. The employees state that thanks to ExplorerNet they are able to cooperate at a much higher level than before.

Mutual Fun in Rite-Solutions

Rite-Solutions (www.ritesolutions.com) created a state-of-the-art "innovation engine" designed to provoke and align individual brilliance toward collective genius. The goal of the company was to connect people on an emotional level where all employees are entrusted with the future direction of the company, asked for their opinions, listened to, and rewarded for successful ideas. Rite-Solutions is a software/system engineering company. It is built on two fundamental beliefs:

- Nobody is as smart as everybody (good ideas are not bounded by an organizational structure, but can come from anyone, in any place, at any time)
- The hierarchical pyramid as a relevance structure is a relic of command and control conventional wisdom, more suited to controlling information flow than fostering innovation

In 2005 Rite-Solutions launched a collaborative stock market-based game with the aim of making the employee feel relevant to the success of the business in the most tangible way, and tapping their amazing intellectual bandwidth far beyond assigned job tasks. The name of the

[15] Celeste Merryman, *Findings from the NASAsphere Pilot*, accessed December 12, 2011, http://socialcast.s3.amazonaws.com/corporate/downloads/NASAsphereReportPublic.pdf.

[16] *In Talk. Social Media in NASA*. May/June 2011, accessed January 15, 2012 http://www.nasa.gov/pdf/542302main_ITTalk_May2011.pdf.

application is Mutual Fun.[17] The first step of the user is to complete a profile that details his/her work experience, expertise and capabilities, interests and curiosities. This is how users establish what they bring to the game table and ultimately allows other players to search for people who might be able to assist them in various areas of their innovative ideas based on profile information. Every person in the company gets an initial $10,000 to invest in their peers' "idea stocks." Players can float, advance and develop portfolios of ideas. Colleagues can make dollar investments in stocks, volunteer time or express interest. An algorithm dynamically derives individual stock values and a player's place on the leader board (from an individual's own idea stock values and activity in assisting, investing, and discussing their co-workers ideas). Inevitably, volunteer teams spring up around initiatives on Mutual Fun. The best ideas are realized by the company.

Some of the most valuable ideas come from the most unexpected places. A company administrator with no technical experience came up with an idea for using a bingo algorithm which Rite-Solutions had created for their casino clients to create a web-based educational tool. The inspiration came when this employee helped her daughter with a school project. That idea, "Win/Play/Learn" immediately caught the attention of some engineers, who developed her idea into a successful product. By 2011 Mutual Fun innovation game generated more than 50 innovative products, service and process ideas, 15 of which have been successfully launched and account for 20 % of the company's total revenue.

My Customer in Best Buy

Our last example is from the company Best Buy (www.bestbuy.com). Best Buy is an innovative consumer electronics retailer with over 1,500 retail locations across North America, Europe and Asia. The Company prides itself on the knowledge of its employees and unleashing the power of its people as part of its core philosophy and values.[18] Best Buy created the software platform "My Customer" to unleash the voice of its more than 100,000 frontline employees to share what they heard or learned from daily interactions with customers. The thought was that Best Buy can solve real problems that employees report in as close to real-time as possible. By processing data in the analytics, Best Buy can acquire early indicators of potential opportunities or issues that can be addressed by various business units throughout the company. The fact that any employee could participate in helping drive change was powerful in itself. The managers are still listening to the employees. My Customer is ingrained in normal business rhythms. Employee satisfaction directionally increased in correlation with the submissions provided. If leaders listen to what employees share, employees in turn feel good about their work and feel valued.

All the above-mentioned companies take advantage from the Web-enabled collective intelligence. All of them link knowledge workers or volunteers with certain knowledge through social media. In all examples groups of individuals do things collectively in a way which seem intelligent. We can state this because all the groups achieve useful results. Wikipedia is a broadly used encyclopedia, Stack Exchange helps people solve problems and achieve professional reputation; InnoCentive is a platform for gathering innovative problem solution, where people can meet

[17] Jim Lavoie, *Nobody's as Smart as Everybody - Unleashing Individual Brilliance and Aligning Collective Genius*, accessed October 10, 2011, http://www.managementexchange.com/story/nobody%E2%80%99s-smart-everybody-unleashing-quiet-genius-inside-organization.

[18] Steve Wallin, *My Customer: One Voice is Noise, Many is a Chorus – Voice of the Customer through the Employee*, accessed October 14, 2011, http://www.managementexchange.com/story/my-customer-one-voice.

companies and vice versa. NASA shifted the level of cooperation to a higher level, Rite-Solutions creates innovative products and Best Buy can immediately respond to customer needs. In these cases we can speak about collective intelligence without hesitation.

Another question is, if the groups of people in our examples address new or trying situations and if their knowledge is used to adapt to a changing environment. In Wikipedia new articles are written every day and many articles are reworked and updated. The content of the articles mirrors the changing environment. In Stack Exchange the experts answer the questions and the knowledge is captured in the application for future needs. The knowledge is used by the people to solve their job tasks or private issues. In any case, the knowledge is used to address a new or trying situation. In InnoCentive the companies directly go public with their problems (trying situations) and thanks to the knowledge of other people their problems are solved. NASA reported that thanks to social networking the communication and problem solving accelerates and the understanding for decision making is deeper than before. If we understand a problem and are able to find a solution, it means that we have adapted to a new situation. Rite-Solutions uses collective intelligence of its workers to create new business ideas and develop new products. If the new product is successful, it means that the company is able to react to the changing needs of its customers. The main idea of My Customer application in Best Buy is to solve the problems of the customers in real time. It means that Best Buy, thanks to My Customer, can address new or trying situations. In all these examples the characteristics of the growth of collective intelligence are fulfilled, and Web-based social networking triggers the growth of social intelligence.

General rules for successful social networking

The preceding examples are concrete cases of the growth of collective intelligence by linking people through social media. But another question arises: Are there any general rules for successful social networking in order to increase collective intelligence? Apparently, to many problems that the companies face, there is potentially a solution out there, however, far outside of the traditional places where management usualy search for it. Why don't more businesses use collective intelligence to solve their problems? It seems that they do not know how. Practice is still far ahead of theory in the field of collective intelligence and managers are not always willing to use the trial-and-error method. In this paper some successful projects are presented, but numerous projects have failed. The MIT Center for Collective Intelligence identified a relatively small set of attributes which are present in successful collective intelligence systems.[19] Let's introduce these attributes and examine if there are present in our examples.

To build the kind of collective intelligence system suitable for the desired goal, managers have to ask four main questions:

What is being done?
Who is doing it?
Why are they doing it?
How it is being done?

In general, these questions have to be answered for any business activity. What often differs in case of the web-based collective intelligence are the answers.

[19] Thomas W Malone, Robert Laubacher, Chrysanthos Dellarocas, "The Collective Intelligence Genome," *MitSloan Management Review*, (Spring 2010, Vol. 51, No.3): 21 – 31.

The answer to *What* is the *mission*, *goal* or at a lower level *task*. As mentioned above, management as a decision making body consists of two steps: it is necessary to create possible solutions and to decide which of them will be realized.

The answers to *Who* are very interesting in case of collective intelligence. Traditionally the answer is the experts or managers inside the company. But in web-based collective intelligence systems activities can be taken by anyone in a large group. The group can be unlimited (like in case of Wikipedia, Stack Exchange or InnoCentive) or limited, e.g. to employees (like in NASA, Rite-Solutions or Best Buy).

Why is the question of motivation. Why do people take part in the activity? Examining the motivation of the contributors is a big and also interesting task. However, we can find three main incentives which make people participate in social networks. It can be money, love and glory.[20] Money is a traditional source of motivation. Love is a motivator which works well in social networks. People are motivated by their enjoyment of an activity or by the opportunity to socialize with others and by the feeling that they contribute to some large cause. Glory can also be an important motivator. People want to be recognized and appreciated by peers, experts or managers.

How refers to the procedure how to chose the best idea proposed by the contributors. (We do not deal with the technical solutions of web-based collective intelligence applications.) Usual group decision making methods such as voting, consensus, and averaging can be used there, sometimes contest is possible and also final individual decision can be made by the responsible person.

In table 1 the attributes *What, Who, Why* and *How* for the above mentioned examples are identified.

Table 1: The *What*, *Who*, *Why* and *How* of the successful collective intelligence networks

Example	*What*	*Who*	*Why*	*How*
Wikipedia	Freely available full sum of human knowledge to all people in their own language[21]	Anyone	Love Glory	There is no need to make decisions. Public and editors can influence the content of the articles.
Stack Exchange	An expert knowledge exchange, network on diverse topics[22]	Anyone	Love Glory	Voting. The best answers are voted by the users.
InnoCentive	The world's largest problem solving marketplace, the open innovation and crowdsourcing pioneer that enables organizations to solve their key problems by connecting them to diverse sources of innovation[23]	Anyone	Love Glory Money	Individual decision. The company chooses the best solution and the author receives a financial award.

[20] "The Collective Intelligence Genome", 27.
[21] "Wikipedia: About", accessed December 10, 2011 http://en.wikipedia.org/wiki/Wikipedia:About.
[22] "Stack Exchange", accessed January 12, 2012, http://stackexchange.com/about.
[23] "InnoCentive", accessed January 13, 2012, http://www.innocentive.com/about-innocentive.

NASA	To foster an environment of creativity and innovative thinking[24]	The employees	Love Glory Efficient teamwork	Team decision making
Rite-Solutions	Create internal markets for ideas, cash & talent, depoliticize decision-making[25]	The employees	Love Glory Money	Voting. Some of the best ideas are founded by the company management – final managerial decision based on employee recommendation.
Best Buy	Create a democracy of information, enable communities of passion, expand the scope of employee autonomy[26]	The employees	Love Glory	Employees' immediate managers response to employee submissions, in more general topics top management is engaged.

As we can see all the networks have a very clear goal, the answer *What* is explicitly answered. Also the answer *Who* is clearly answered. It is necessary to give considerable thought to whether it is appropriate to ask the public to participate or to limit the network only to the employees or chosen experts. If a company invites the public, they can meet the people with knowledge and skills which they would not otherwise meet. But they also have to count on bigger danger of misuse or sabotage of the network. To cooperate with the people the company knows is better for the corporate security; however achievable knowledge and skills are smaller.

Before the company launches a collective intelligence network, they have to be sure as to the motivation of the participants to cooperate inside this network: *Why* should they participate? If there is no clear motivation, the project will sooner or later fail. In our examples the participants are highly motivated. It is surprising how many people love to contribute to Wikipedia or Stack Exchange. They do it for free, for their enjoyment or maybe for glory. If your answers in Stock Exchange are often voted for by other users, you start to be so-called guru and the employers can ask you for paid cooperation. But it seems that the main reason why people participate in Stack Exchange is the support and help to people who ask questions.

InnoCentive is an interesting corporate – public network. The participants can simply have fun when they suggest problem solutions, or they hope they will be recognized as experts and will be invited to some form of paid cooperation or they can even win the money promised by the company for the best problem solver.

NASA tried to create some up-to-dated communication tool for knowledge workers. The employees may like this tool, they can be recognized as experts but the main reason why to participate in the network is better, easier and faster cooperation inside the company. The networks used in NASA are efficient tools of knowledge management and help people work. In Rite-Solutions all the three motivators are interconnected. It is fun for the employees to participate, they can profile themselves as active experts and they can earn money because the system works as a stock market of ideas. If the idea is chosen for realization, it is fanatically supported by the management. Money is not the subject in Best Buy. The motivation for the employees is their engagement which is taken seriously by the managers. Employees feel that they are being listened to and that there is a response to their ideas which motivates them to continue to submit their ideas. The best of them are also

[24] James **McClellan**, *Beyond 140 Characters: Social Media@JSC* accessed January 14, 2012, http://www.nasa.gov/offices/ocio/ittalk/5-2011_SocialMediaAtJSC.html.

[25] Lavoie, *Nobody's as Smart as Everybody.*

[26] Wallin, *My Customer.*

recognized as high performers. As the network was created as a form of customer support, the increased satisfaction of customers makes the work more pleasant.

How represents the way collective intelligence will be used. *How* must be also clear, otherwise all the effort of the participants can be lost. In Wikipedia there is no need to decide a certain problem. In this case the participants cooperate in a surprisingly efficient way when creating and updating the articles. Also at Stack Exchange there is no need to decide which answer or question is the best one. However, the users can mark their favorite answers. Every user can decide which proposed solution is the best for his/her purpose. InnoCentive is a case of individual decision-making. Somebody in the company which posted the problem (challenge), has to choose a solution. In NASA the application serves for communication and for team work. Thus the decision is a matter of a team. In Rite-Solutions the management asks the employee to vote and they trust collective intelligence of their employees. In Best Buy the employees only post their experience, problems or ideas and mangers decide how to solve the situation.

We can conclude that in all the examples the answers to *What*, *Who*, *Why* and *How* are clear and known to all the participants. If people know, what is being done, that they are welcomed to participate, what the benefits they can achieve are, and how their contribution is used as a part of a bigger project, they are highly motivated. They are willing to share knowledge and become a part of a creative collective intelligence network.

Conclusion

The current management models inhibit the success of many companies. The companies which are able and willing to innovate their managerial methods achieve a strong competitive advantage. One of the big opportunities is the use of collective intelligence in decision making. Attainable collective intelligence is nowadays almost unlimited thanks to the Internet-based social networks. The use of collective intelligence can help companies solve their problems, to mitigate the effects of decision making traps, to overcome the individual brain limitations, etc.

We have introduced six examples of successfully growing collective intelligence, which is used in favor of the public or in favor of the companies. In many companies the use of collective intelligence is not yet on the agenda. The reason is that there are no general rules or guidelines how to build an efficient social network and how to take advantage of collective intelligence of the participants. There is always the danger, that instead of collective intelligence the company can tap into a collective madness. A lot of research has to be done before some general recommendation for building collective intelligence-based networks can be articulated. Moreover, it is very likely that the development of ICTs will be faster than research. So, what else can managers do than just look at examples and hope for inspiration and success? In this paper we have proved that well prepared answers to the common business questions *What, Who, Why* and *How* can support the success of a social network and to stimulate the growth of collective intelligence. There may be many combinations of *What, Who, Why* and *How*, but they always have to be carefully specified. Then the chance the project will be successful in the long-term increases. The use of social networking and collective intelligence is a big opportunity, it brings some risk but in any case it is an adventure.

References

- Eric Bonabeau, "Decisions 2.0: The Power of Collective Intelligence," *MIT Sloan Management Review*. (Winter 2009): 45-52.
- Rafiq Dossani, *Social Media and the Future of Business*, accessed October 5, 2011, http://www.wipro.com/Documents/insights/SOCIAL-MEDIA.PDF.

- Gary Hamel, "The Management 2.0 Challenge. How Will You Reinvent Management in Your Organization?" *Harvard Business Review*, July 28, 2011.
- John S. Hammond, Ralph L. Keeney and Howard Raiffa, "The Hidden Traps in Decision-Making," *Harvard Business Review* (January 2006): 118-126.
- "Handbook of Collective Intelligence", accessed January 10, 2012, http://scripts.mit.edu/~cci/HCI/index.php?title=What_is_collective_intelligence%3F.
- Eric von Hippel, *Democratizing Innovation* (Cambridge, MA: MIT Press, 2005).
- "InnoCentive", accessed January 13, 2012, http://www.innocentive.com/about-innocentive
- *In Talk. Social Media in NASA*. May/June 2011, accessed January 15, 2012 http://www.nasa.gov/pdf/542302main_ITTalk_May2011.pdf.
- Jim Lavoie, *Nobody's as Smart as Everybody - Unleashing Individual Brilliance and Aligning Collective Genius*, accessed October 10, 2011, http://www.managementexchange.com/story/nobody%E2%80%99s-smart-everybody-unleashing-quiet-genius-inside-organization.
- Thomas W. Malone, Robert Laubacher, and Michael S. Scott Morton, *Inventing the Organizations of the 21st Century* (Cambridge, MA: MIT Press, 2003).
- Thomas W Malone, Robert Laubacher, Chrysanthos Dellarocas, "The Collective Intelligence Genome," *MitSloan Management Review*, (Spring 2010, Vol. 51, No.3): 21 – 31.
- Thomas W. Malone, Kevin Crowston, and George A. Herman, *Organizing Business Knowledge: The MIT Process Handbook* (Cambridge, MA: MIT Press, 2003).
- Thomas W Malone, *The future of work: how the new order of business will shape your organization, your management style and your life* (Boston: Harvard Business Press 2004).
- James **McClellan**, *Beyond 140 Characters: Social Media@JSC* accessed January 14, 2012, http://www.nasa.gov/offices/ocio/ittalk/5-2011_SocialMediaAtJSC.html.
- "Measuring collective intelligence" accessed January 12, 2012, http://cci.mit.edu/research/measuring.html.
- Celeste Merryman, *Findings from the NASAsphere Pilot*, accessed December 12, 2011, http://socialcast.s3.amazonaws.com/corporate/downloads/NASAsphereReportPublic.pdf.
- "MIT Center for Collective Intelligence – Publications", accessed November 19, 2011, http://cci.mit.edu/publications/index.html.
- "Stack Exchange", accessed January 12, 2012, http://stackexchange.com/about.
- Steve Wallin, *My Customer: One Voic is Noise, Many is a Chorus – Voice of the Customer through the Employee*, accessed October 14, 2011, http://www.managementexchange.com/story/my-customer-one-voice.
- "Wikipedia: About", accessed December 10, 2011, http://en.wikipedia.org/wiki/Wikipedia:About.

ECONOMETRIC DETERMINATION OF VOTING BEHAVIOUR

Nicolae-Marius JULA[*]
Nicoleta JULA[**]

Abstract

In this paper, we are testing the responsive hypothesis: if the economy is growing strongly and unemployment is low, the incumbent party has a very good chance of retaining office. When the economy is faltering, voters will more likely vote for change. We use econometric models for forecasting, based on economic data, the voter's choices and the evolution of the economy under the influence of political pressure.

Keywords: *economic voting, responsive hypothesis, econometric forecasting, regional data analysis, vote function*

Introduction

Forecasting the voting results using the economic data has been an intensive research in western democracies and United States. In Romania, the democratic experience computes a small number of electoral moments. Therefore, it is not possible yet to build an electoral behaviour econometric model using the political time series. In these circumstances, in the following section, by the examination of the political and economic dynamics during the 1990-2012, we try only to identify some significant signals concerning the economic impact of the electoral timing. We use an econometric model to analysis the political behaviour using a regional economic and political data.

The analyses start from the study of Ray C. Fair, *The Effect of Economic Events on Votes for President*. We adapt his model to Romanian's situation and we use this for forecasting the voting results using quarterly data from 2000 until 2012.

The importance of such a study is underlined also by rich international literature focused on the impact of the political behaviour on economic conditions. It is important to analyse if political factors do influence the economy not for the common wealth, but for increasing their chances of re-election.

The answer to this subject is reflected by the results presented in this study. The economic and econometric evidences are presented to support the results. There is a large specialized international literature on economic voting and we tested some methods and models to find out if the results for Romania are in accordance with the results obtained for other western democracies

Ray C. Fair econometric model

In USA, like in other democracies, the voters tend to be influenced by the state of economy. If the economy is growing strongly and unemployment is low, the incumbent party has a very good

[*] Senior Lecturer, Ph.D., Faculty of Economic Sciences, "NicolaeTitulescu" University, Bucharest, Romania (email: mariusjula@univnt.ro)

[**] Professor, Ph.D., Faculty of Economic Sciences, "NicolaeTitulescu" University, Bucharest, Romania (email: nicoletajula@yahoo.com).

chance of retaining office. When the economy is faltering, U.S. voters will more likely vote for change. Second, Americans tend to favour an incumbent president running for re-election. If the economy is weak enough, however, an incumbent president can lose, as Jimmy Carter learned in 1980 and George H. W. Bush did in 1992.

There were predictions for many years, since 1948. The equation predicts the percentage share of the two-party vote won by the incumbent party, and is fitted over the 16 elections since the Second World War (Table 1). It is driven by a combination of economic and predetermined political factors.

Table 1 [1]

Election Model Results

(Percentage of two-party vote for incumbent party)

					Incumbent	
					Party's	
Election	**Actual**	**Fitted**	**Error**		**Candidate**	**Opponent**
1948	52.4	54.0	-1.7		Truman (D)	Dewey (R)
1952	44.6	42.1	2.5		Stevenson (D)	Eisenhower (R)
1956	57.8	57.6	0.2		Eisenhower (R)	Stevenson (D)
1960	49.9	48.5	1.4		Nixon (R)	Kennedy (D)
1964	61.3	60.6	0.8		Johnson (D)	Goldwater (R)
1968	49.6	50.4	*-0.9*		Humphrey (D)	Nixon (R)
1972	61.8	57.5	4.3		Nixon (R)	McGovern (D)
1976	48.9	50.6	*-1.6*		Ford (R)	Carter (D)
1980	44.7	44.1	0.6		Carter (D)	Reagan (R)
1984	59.2	58.7	0.5		Reagan (R)	Mondale (D)
1988	53.9	53.1	0.8		Bush (R)	Dukakis (D)
1992	46.5	47.0	-0.5		Bush (R)	Clinton (D)
1996	54.7	53.7	1.0		Clinton (D)	Dole (R)
2000	50.3	52.6	-2.4		Gore (D)	Bush (R)

[1] http://www.ihs.com/products/global-insight/industry-economic-report.aspx?ID=1065931711

2004	51.2	54.8	-3.5		Bush (R)	Kerry (D)
2008	46.3	47.8	-1.4		McCain (R)	Obama (D)
2012		50.3			Obama (D)	? (R)
Note: italicized errors represent elections where the equation incorrectly predicted the winner of the popular vote.						

The econometric model

Ray C. Fair uses a model like:

$VOTE_t = a_1 + a_2(GROWTH_t - GROWTH^*) + a_3(INFLATION_t - INFLATION^*)(1 - WAR_t) + a_4(GOODNEWS_t - GOODNEWS^*)(1 - WAR_t) + a_5PERSON_t + a_6DURATION_t + a_7PARTY_t$, t=1,...,23

The notation for the variables is as follows:

- *VOTE* = Incumbent share of the two-party presidential vote.
- *PARTY* = 1 if there is a Democratic incumbent at the time of the election and -1 if there is a Republican incumbent.
- *PERSON* = 1 if the incumbent is running for election and 0 otherwise.
- *DURATION* = 0 if the incumbent party has been in power for one term, 1 if the incumbent party has been in power for two consecutive terms, 1.25 if the incumbent party has been in power for three consecutive terms, 1.50 for four consecutive terms, and so on.
- *WAR* = 1 for the elections of 1920, 1944, and 1948 and 0 otherwise.
- *GROWTH* = growth rate of real per capita GDP in the first three quarters of the election year (annual rate).
- *INFLATION* = absolute value of the growth rate of the GDP deflator in the first 15 quarters of the administration (annual rate) except for 1920, 1944, and 1948, where the values are zero.
- *GOODNEWS* = number of quarters in the first 15 quarters of the administration in which the growth rate of real per capita GDP is greater than 3.2 percent at an annual rate except for 1920, 1944, and 1948, where the values are zero.

The variable WAR appears in the vote equation because INFLATION and GOODNEWS are zeroed out for 1920, 1944, and 1948. This treatment leads to there being a different constant term in the equation for these three elections, which is what WAR is picking up. To see this precisely, consider the equation:

GROWTH* is the "normal" rate, normal in the sense that growth rates above this value are a plus for the incumbent party and growth rates below it are a minus. The same is true for INFLATION* with the sign reversed, and the same is true for GOODNEWS*.

The equation has VOTE on the left hand side and the other variables plus a constant term on the right hand side. It is linear in coefficients. The estimation period begins with the 1916 election. The equation is estimated by ordinary least squares.

For the 2012 election PARTY is 1, PERSON is 1, DURATION is 0, and WAR is 0. Multiplying these values by their respective coefficients and adding the intercept gives a value of 48.39. A modified version of the vote equation for 2012 is then:

$$VOTE = 48.39 + .672*GROWTH - .654*INFLATION + 0.990*GOODNEWS$$

or

The equation to predict the 2012 presidential election is

*VP = 48.39 + .672*G - .654*P + 0.990*Z*

Interpretation: In January 28, 2012, forecast from the US model compared with data from October 30, 2011: G is now 2.88 rather than 2.75, P is now 1.54 rather than 1.88, and Z is still 1. (The one strong growth quarter is 2012:3.) The new economic values lead to a predicted value of VP of 50.30, essentially the same as the 50.0 in October.

As Ray C. Fair stated, "The main message from the presidential vote equation is again the same as it has been from the beginning. For a moderately growing economy, which the US model is now forecasting, the election is predicted to be close. The current US model forecast is probably somewhat more optimistic than consensus, but with slightly slower growth in 2012, the election would still be predicted to be close. If the economy suddenly starts to boom - say 5 or 6 percent growth - Obama would be predicted to win by a comfortable amount. If the economy suddenly goes into another recession - say minus 5 or 6 percent growth - the Republicans would be predicted to win by a comfortable amount. As of this writing the economy in 2012 looks like it will be ok, but not great, which means a close election - essentially too close to call. If the economy does turn out to be ok, but not great, and if the election is close, the voting equation will have done well. If instead in this case the election is not close, the equation will have made a large error."[2]

Estimation for Romanian Presidential elections

We start with the Ray C. Fair's model:

$VOTE_t = a_1 + a_2(GROWTH_t - GROWTH^*) + a_3(INFLATION_t - INFLATION^*)(1 - WAR_t) + a_4(GOODNEWS_t - GOODNEWS^*)(1 - WAR_t) + a_5PERSON_t + a_6DURATION_t + a_7PARTY_t$, t=1,...,23

For Romania:

WAR=0

PERSON=0

DURATION=1

PARTY=1 (we use 1 for incumbent party and -1 for opposing coalition)

GROWTH*=0

INFLATIN*=0

GOODNEWS*=1

So, the adjusted equation for Romania is:

$VOTE_t = a_1 + a_2GROWTH_t + a_3INFLATION_t + a_4GOODNEWS_t + a_5PERSON_t + a_6DURATION_t + a_7PARTY_t$, t=1,...,23

In Romania, the democratic elections were recorded in 1992, 1996, 2000, 2004 and 2009. The elections from 1990 cannot be considered in the model because of the change in the political system following the revolution from 1989. We have only 5 different moments, so an econometric model based on these data cannot be validated.

Assuming that the coefficients in the regression would be close to the ones from Fair's model, in a calibration model for Romania, we have the following situation:

Growth=7.2 (in trimester III, 2011, the GDP is 1.8 higher than in trimester II)

Inflation=21.81 (for the last 45 months)

[2] http://fairmodel.econ.yale.edu/vote2012/index2.htm

Z=7 (7 trimesters of growth for GDP from last 15)
*VP = 48.39 + .672*G - .654*P + 0.990*Z*
VP=45.89
That means the candidate from the ruling party would obtain about 45% in a direct competition with an opposing candidate.

Paldam model - Presidential election - November 2009

Elections for President of Romania from 22nd November – 6th December 2009 were conducted in accordance with Law no. 370/2004, as amended and supplemented, supplemented by Government Emergency Ordinance no. 95/2009.[3]

According to the new electoral law that marks the difference between the term of President's seat (5 years) and duration of the seat of Parliament (four years) for the first time in Romanian politics, election of the President of Romania was not held simultaneously with elections for the Chamber of Deputies and the Senate. Instead, its first round of electing the President of Romania overlapped with the time of the national referendum held on the initiative of the President in office, on the shift from a bicameral Parliament in an unicameral Parliament and reducing the number of Parliament's members to the maximum of 300. The first round of Presidential elections was set on November 22nd, 2009, and the second round was scheduled two weeks later (December 6th, 2009).

In due time, a total of 29 applications were made, of which the Central Electoral Bureau admitted 12 (3 - of the independent candidates and 9 from political parties)[4]. The percentage of voters was 54.37%, over 15 percentage points higher than in parliamentary elections (39.20%).

Results for Presidential elections – 1st round, 22nd , November 2009

		Valid cast votes	
No.crt.	Name and surname of the candidate	Number	% of total number
1	Traian BĂSESCU (PD-L)	3153640	32.44%
2	Mircea-Dan GEOANĂ (PSD)	3027838	31.15%
3	Crin ANTONESCU (PNL)	1945831	20.02%
4	Corneliu VADIM-TUDOR (PRM)	540380	5.56%
5	Hunor KELEMEN (UDMR)	373764	3.83%
6	Sorin OPRESCU (independent)	309764	3.18%
7	George BECALI (PNGcd)	186390	1.19%

Source: Central Electoral Bureau for election of the President of Romania from 2009, first round results, November, 22nd, 2009, http://www.bec2009p.ro/rezultate.html

The other five candidates have obtained each a percentage less than 1% of votes, which means less than the required minimum number of supporters that was presented to support the application (200,000 supporters).

In the second round, held on December 6th, 2009, the first two runners competed and the turnout has been higher, 58.02%. TraianBăsescu, the President in office, won by a close shave the

[3] Government Emergency Ordinance no. 95/2009 amending and supplementing Law no. 370/2004 for the election of the President of Romania, published in Official Journal no. 608 of September 3, 2009.

[4] Applications rejected did not meet certain criteria imposed by the electoral law: in most cases, were not accompanied by a list of at least 200,000 supporters.

Presidential elections, with a difference of less than one percentage point from the PSD candidate (50.33% vs. 49.66%, nearly 70,000 additional votes, from a total of 10,500,000 valid votes).

As Election Observation Mission OSCE / ODIHR[5] assessed: "The elections for President of Romania in 2009 took place in an atmosphere characterized by respect for fundamental political freedoms and were conducted generally in accordance with OSCE commitments and international standards for democratic elections and with national legislation. Although authorities have taken steps to correct some deficiencies observed in the first round and to investigate irregularities, further efforts are needed to address remaining weaknesses in order to improve election process and to enhance public confidence"[6].

Paldam model

Vote function (hereafter V-function) is defined as a function explaining (the change in) the vote for the government by (changes in) economic conditions and other variables. A Popularity function (hereafter P-function) explains (the change in) the popularity of the government – as measured by pools – by (change in) the economic conditions and other variables.

For Romania, we have studied the impact inducted by the state and dinamics of some economic variables on the change of voting intensions. The data are analysed in regional structures. We used a Paldam type model. In its most simple linear version the function are:

$$\Delta P_t = \{a_1 \Delta u_t + a_2 \Delta p_t + \ldots.\} + [c_1 D^1{}_t + c_2 D_t^2 + \ldots] + e_t$$

Here Δ is used to indicate the first difference; P is either the vote or the popularity, for the political parties, in %. The *a*s and *c*s are coefficients to be estimated, and the *e* is the disturbance term. The braces contain the economic variables: the e-part of the model. Two of the variables are *u* and *p*, where *u* is the rate of unemployment and *p* the rate of price rises. The next set of variables, the *d*s, are the political variables forming the p-part of the model – it is found in the square brackets.

For Presidential election, we have built a model where periods are shown separately: May 2008 - November 2008 (PNL in office) and November 2008 - November 2009 (PD-L in office)

$$pr_{ij} = \{a_0 + a_1 \cdot cj_{ij} + a_2 \cdot prescj_{ij}\} + [a_{3,i}(rs_{nov2008} - rs_{mai2008})_j + a_{3,i}(rs_{nov2009} - rs_{nov2008})_j] + e_{ij},$$

where pr_{ij} – represents the share of votes won by the competitor *i* for Presidency in county *j*, to the total number of valid votes in that county, in the Presidential Elections in November 2009

We anticipate, in line with the economic voting theory, that a_3 is negative for candidates who represent the ruling parties and positive for the ones representing opposition parties.

The results for Presidential elections in November 2009 are not econometrically significant. Nor is any other econometric model, in which the results from parliamentary elections in November 2009 are regarded as political variables and as economic variables are used the change in

[5] OSCE/ODIHR means Organization for Security and Co-operation in Europe / Office for Democratic Institutions and Human Rights

[6] Romania, Presidential Elections, November 22nd and December 6th, 2009 – Final Report of Election Observation Mission OSCE / ODIHR, cited by the Permanent Electoral Authority, the *White Paper for Election of President of Romania 2009*, p. 103, http://www.roaep.ro/

unemployment between the two time election, or three months before the election. Lack of regional statistics for other economic variables discussed in the specific literature in the context of vote-popularity functions (e.g. inflation) has not allowed the construction of some models with more variables. Subject to this methodological observation, the conclusion of the tested econometric models is that for Presidential elections in Romania, organized in November 2009, the economic voting has no significant influence on election results of the main candidates, as resulted in regional structures.

Conclusions

The recorded data for Romania is a major drawback in the estimation models from international literature regarding the forecasting of vote behaviour based on economic variables. The only solution is to use regional data, when available.

The Ray C. Fair model can be only partially tested and used for Romania because of the history data regarding economic situation for more electoral moments. If for US there are 16 electoral moments, we have only 5. Using this model, the results are that a candidate from the current ruling party would lose the elections.

Other models, like Paldam's presented one, cannot be econometrically supported (estimators do not pass the significance tests). Until further date, we can admit the hypothesis that elections from 2009 were not influenced by an economic voting, but other political and social factors.

References

- Alesina A., Roubini N., & Cohen G.D. (1997). *Political Cycles and the Macroeconomy*, Cambridge – Massachusetts: MIT Press, 1997
- Drazen A. (2000). *The Political Business Cycle After 25 Years*, Working paper, University of Maryland, Hebrew University of Jerusalem, and NBER, May
- Fidrmuc J. (1996). *Political Sustainability of Economic Reforms: Dynamics and Analysis of Regional Economic Factors*, Working paper, CentER for Economic Research Tilburg University, Tilburg, The Netherlands
- Fidrmuc J. (2000), Political support for reforms: Economics of voting in transition countries, *European Economic Review* 44, 1491-1513
- Fair C. R. (2012), Predicting Presidential Elections and Other Things, Second Edition, Stanford University Press, Stanford, California, USA
- Frey B. (1996). *Political Business Cycles*. Aldershot: Edgar Elgar.
- Gaertner M. (1994). Democracy, Elections and Macroeconomic Policy; Two Decades of Progress, *European Journal of Political Economy*, 10: 85-110.
- HallenbergM.,& Souza L.-V. (2000). *The Political Business Cycles in EU Accession Countries*, Tinbergen Institute Discussion Paper, TI-2000-085/2
- Hayo B. (2000). *Micro and macro Determinants of Public support for Market reforms in Eastern Europe*, Working paper B-25/1999, ZentrumfürEuropäische Integrations forschung, Rheinische Friedrich-Wilhelms-Universität Bonn
- JulaD.,&Jula N. (2000a). *Economie sectorială*, Ed. DidacticăşiPedagogică, Bucureşti
- JulaD.,&Jula N. (2000a). Political Business Cycles. An Overview, *Romanian Economic Research Observer*, 1:6-14, Romanian Academy.

- JulaD.,&Jula N. (2000b). Political Business Cycle in Romania, *Romanian Economic Research Observer*, 4:6-25, Romanian Academy.
- JulaD.,&Jula N. (2000c). Economic Signals of Political Behaviour in Romania, in *The Economy of Development*, Proceeding papers, The International Conference of Financial-Accounting and Administrative Management Faculty, Bucharest Ecological University, Bucharest, 4-5 April.
- NannestadP.,&Paldam M. (1994). *The VP-Function: A Survey of Literature on Vote and Popularity Functions after 25 Years*, in *Public Choice* 79, 213-245.
- NannestadP.,&Paldam M. (1999). *The Cost of Ruling. A Foundation Stone for Two Theories*, Working Paper 19/5, Department of Economics, Aarhus University, Denmark
- Pacek A.C., (1994), *Macroeconomic Conditions and Electoral Politics in East Central Europe*, in *American Journal of Political Science* 38, 723-44.
- Paldam M. (1997), *Political Business Cycles*, cap. 16 in Mueller (ed.), *Perspectives in Public Choice. A Handbook*, Cambridge UP: Cambridge, UK & NY.
- Persson T., &Tabellini G., 1990, *Macroeconomic Policy, Credibility, and Politics*, Chur, Switzerland: Harwood Academic Publishers.
- Rodrik D. (1995). *The Dynamics of Political Support for Reforms in Economies in Transition*, in *Journal of the Japanese and International Economies* 9, 403-25.

ECONOMIC CRISIS AND THE COMPETITIVENESS OF TRANSNATIONAL COMPANIES

Liviu RADU[*]
Carmen RADU[**]

Abstract

In crisis situations, the competitiveness of transnational companies becomes a particularly complex concept, due to the fact that said business entities are continuously moving within the context of internationalization and increasing use of global strategies. Given the current economic context, one cannot merely assess the competitiveness level of any given transnational company from a static standpoint, depending on the turnover, sales volume or number of employees of said company, but such assessment needs to be made from a dynamic standpoint, in close connection with the internal and international business environment in which that company carries out its activity.

Keywords: *national competitiveness, transnational companies' competitiveness, competitive advantage, transnational level, economic crisis*

Introduction

The concept of competitiveness is similar to that of economic efficiency and reflects a conjuncture of the economic activity, determined by a certain consumption of resources for obtaining goods and services. This approach presents the competitiveness from the efficiency of distributing resources standpoint, bringing in the center of attention the existing relation between maximizing effects and minimizing the efforts made by economic agents. The production of goods and services reflects the competitiveness under the conditions of diminishing costs, while the production's distribution under competitiveness conditions must assure, on one hand, a concordance between the volume, structure and quality of goods and services and, on the other hand, the market's exigencies.

While studying competitiveness, this has been approached through the angle of competitive advantage, when the competitiveness on a national level and similar with the term of competition was taken in consideration, and when the competitiveness of an economic agent on an international plan was being analyzed. At the same time, more detailed approaches were expressed by Kirsy Hugues[1] who considers competitiveness to be a problem of relative, static or dynamic efficiency, as well as a reflection of firm's performances in the international commerce (moderated performances), either under the form of export mark shares, or under the form of import penetration degree.

In conclusion, competitiveness is the capacity of an economic agent, product or service, individual or activity, to be susceptible to support the competition with the others participants to the market. On each economic agent's level, more categories of competitiveness can be identified: global, financial, commercial, human, managerial, technical and organizational. On the economic

[*] Senior Lecturer, Ph.D., Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University, Bucharest, Romania, (email: lradu@yahoo.com).
[**] Senior Lecturer, Ph.D., Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University, Bucharest, Romania, (email: cradu@univnt.ro)
[1] Hugues Kirsty (1993), European Competitiveness, Cambridge University press, p. 5

agent's level, global competitiveness represents his potential and implies the accomplishment of a diagnosis or an analyzing inventory of the capacity it disposes of, namely that of the financial-economic forces it can mobilize and the firm's vulnerable points. In other words, competitiveness depends on the proper functioning of the economic agents' assembly of organizational components.

The analysis of competitiveness concepts and competitive advantage, the role of foreign investments and attenuation of economic crisis are subjects of permanent interest. Specialized literature has benefited in time of the analyses of multiple prestigious authors, such as John H. Dunning, William Northaus, Kirsty Hugues, Robert Solow, Gilbert Abraham – Frois, or Ngaire Woods. In the Romanian economic literature the special contribution of researchers Costea Munteanu, Alexandra Horobeţ, Anda Mazilu, Vasile Dan, Liviu Voinea etc. are noticeable.

The present global crisis, initiated in 2008, determined a decrease in international production of goods and services offered by the 82.000 transnational companies and by their 810.000 branches that function on a global scale. Decreases in profit, withdrawals of capital, massive discharges, restructurings and bankruptcies were recorded on these companies' level.

The global crisis initiation was predicted and afterwards analyzed by Nouriel Roubini, the Nobel Prize for economy winner from 2008, Paul Krugman, Professor Joseph Stigliz and the controversial investor George Soros. Along with them international financial organisms such as the World Bank, European Central Bank and the International Monetary Fund, and trough competent voices such as Christine Lagarde, warn that the crisis situation has not yet been surpassed and, instead, the risk exists that it will gain new features and aggravate in 2012.

The present study proposes to analyze the challenges to which the transnational companies that wish to maintain a high competitiveness in the context of the actual crisis must answer to.

PAPER CONTENT

1. Conceptual analysis of the term competitiveness

The specialized literature (David Held, Anthony Mc Grew, David Goldblatt and Jonathan Perraton, 2004)[2], while analyzing the transnational companies' activity, considers that at the present time they compete on a global scale, remaining, however, anchored in the originating country's economic system and extracting their competitive advantage particularly from the national base, but applying global strategies in order to withstand the competition. To this extent, UNCTAD (2002) considers competition as being "the main locomotive" of competitiveness, by referring to the activity of those said companies, and delimits static competitiveness from the dynamic one. Static competitiveness highlights emphasizes price competitiveness, determining firms to compete on the basis of facilities. Conditions in which maintaining the competitiveness depends on the increase or decrease of fabrication costs. Simultaneously, dynamic competitiveness is associated with the changing nature of competition which does not only emphasize the connection between costs and prices but also the firm's ability to learn, to rapidly adapt to new market conditions and to innovate. Consequently, the lack of resources, insufficient technological capacities and the incapacity to adapt trough innovation can cause the firms considered competitive on internal scale, to lose the ability to answer to the international competition's exigencies.

[2] Held David, Mc Grew Anthony, Goldblatt David and Perraton Jonathan (2004) – Global changes : politics, economy and culture, Polirom Publishing House, Iaşi

Other approaches (Iuliana Ciochină, Alina Voiculeț, 2004)[3], define the term competitiveness through its characteristics: strategic competences: long term prediction and organizational competences: risk management.

The definition underlines especially the managerial competences, the adaptability of production and of transnational companies' marketing, on the host-countries' level.

Associated to a multinational corporation, the term of competitiveness suggests security, efficiency, quality, high productivity, adaptability, success, modern management, superior products, optimum costs. However, in order to consider a firm to be competitive, a rigorous analysis is required to be applied on the said firm as well as on its activity environment. A firm's competitiveness is mainly influenced by the capacity to understand and adapt as properly as possible to the surrounding world. These approaches along with classifying the corporations whose activity exceeds national borders (established by Charles Hill in 1998)[4], empower us to consider a transnational company to be competitive under the conditions in which it can adapt its production and marketing offer to the local environment's conditions, which brings into foreground the commerce and its competitive advantage. To this extent, the companies' present tendency to globalize determines us to not neglect the aspects related to competition, analyzed through the experienced gained and valorized as a result to adaptability and innovation.

The recent study on competitive firms emphasized some of their similar characteristics but the audit of the firm's potential remains to be concretized in the list of factors or foundations of competitiveness as follows[5]: The financial competitiveness can be evaluated by: the size of the profit, the capacity to auto finance, potential of financial capacity and potential to solvability. The commercial competitiveness is given by: market share, turnover evolution and commercial notoriousness; the technical competitiveness implies: the nature of equipment, technical advance and supply; the managerial competitiveness involves: the leaders' profile, the capacity to lead and the collaborators' value; the organizational competitiveness refers to: the form of organizational structure, the nature of decisions delegation and the rate of integrating individuals and services in the firm's objectives.

Thus, one might consider competitiveness to be the economic capacity of an enterprise to comply with an effective or potentially competition. Competitiveness can be evaluated in accordance to certain elements, such as: price, product quality, services post sales, flexibility and versatility of offer. Out of all these elements the most important ones are the price and quality of products. At the same time and according to a well-known definition from the American specialized literature (M. Porter – 1987)[6], the competitive advantage can be obtained: by reducing costs or by qualitative differentiation of products. In the fight for new markets, the firms must emphasize their qualities in order to win advantages ahead the competitors. This is one method of seeing competition, but a more detailed view must take in consideration the obtained results in an industrial competitive structure in the international market. A firm's direction is given by its own strategy, whilst the chances to succeed are given by competitive advantages. In order to increase an enterprise's competitiveness, to withstand the competition and exacerbate profits, the manager requires information regarding changes from the domain on a global scale, needs to know the tendencies on the international market

[3] Ciochină Iuliana, Voiculeț Alina (2004) – The firm's competitiveness from European perspective, paper sustained at the International Economic Conference - Lucian Blaga University, Sibiu, 2004

[4] Hill Charles (1998) - International Business: Competing in the Global Marketplace, McGraw-Hill Companies; 2nd edition (July 2, 1998)

[5] Dan Vasile – *Industrial competitive strategies and structures*, All Educational Publishing House, Bucharest, 1997

[6] Porter Michael (1987) – From competitive advantage to corporate strategy, Harvard Business. Review, no 3, 1987

and the perspectives of its evolution and also to detain information about the global competitors' programs. The managerial model is changing and the present manager must not limit to the strict business of its firm and just to knowing the evolution of business from the branches in the country in which he works. Transnational competitiveness is carried out by transnational companies, through complex managerial strategies, by effectuating strategic merges and alliances and promoting foreign direct investments.

2. The connection between national and transnational companies' competitiveness

According to certain experts' opinion[7], „there was a time when the nation state was regarded as being an economic force, primordial and capable to dictate the rules of the game in accordance to other economic agents. That period is long gone. Gradually, a transfer of power was produced by the following three coordinates: from the poorly industrialized countries to the strong ones; from states to markets and through this to transnational companies; part of the power gradually diminished, in the sense that no one carries it out." The same author also identifies the main causes at the base of this forces rapport: technological innovations promoted by transnational companies; high costs of new technologies that the said companies cannot sustain alone and not to mention the emphasis placed on the structural power to the detriment of the relational one.

The transnational companies' objectives are not always similar to the competitive objectives of every country in which these companies act. However, the governments of the host countries can, most of the times, encourage the STN arrival, trusting that those will contribute financially, humanly and technologically to the national economic and social competitiveness. Transnational companies have as well their own interest in maintaining some connections with the host countries' governments in order to avoid the enclosure of the awarded rights and freedoms. At the same time, another interest is to keep the inalienable image of the products and brands they represent by avoiding any inappropriate behavior on a national market that could have serious consequences on their competitiveness on all national markets in which they are present.

Consequently, all international agreements and treaties consider the following as being main responsibilities for the multinational corporations that are active in host countries: to contribute to the development of receiving economies; to protect the environment; to create new jobs; to maintain good relations with the employees; to assure a loyal competition; to take in consideration the consumer's norms of protection; to contribute to the removal of corruption and bureaucracy and to value the human rights. At the same time, the host country is interested in the transnational companies and autochthon firms to follow the national legislation and not violate to their own advantage the weaknesses of the legislative and administrative system even if it interposes in the economic activity.

The connection between the host countries' and the transnational companies' double competitiveness is emphasized by the main responsibilities established by the international forums (U.N.O. and O.E.C.D.)[8] for this companies. OECD creates a set of rules that should be followed by transnational companies in order to pursue the host countries' interest: firstly, they have to contribute to the economic, social and environmental progress; secondly, to encourage the local capacity for developing the enterprises' activities on local and foreign markets; thirdly, to encourage the development of human resources especially by assuring opportunities of development and facilitating

[7] Strage S.(1997) – The Retreat of State, Cambridge University Press

[8] In 1986, within the U.N.O., a Code of conduct of CMN was adopted and greeted with the universal need of regulating the conduct of relations between the states members of U.N.O. and the transnational corporations, and the Organization for Economic Co-operation and Development (OECD) established a guide for CMN in 1976.

the access of employees to courses for specializing one's carrier (training) and last but not least, to not involve in the local policy by respecting the human resource to its true value.

In short, one might consider the following as being particularly important in analyzing the competitiveness of transnational companies and of host countries:

- The contribution of public incomes of the host countries. As it is well-known, public incomes are part of the most important sources of financing development projects. Consequently, the governments of host countries are interested that the transnational companies are respecting the engagements of paying debts to the state budget and are not using abusive practices in remigration of profits. The companies are, simultaneously, indebted to put, at the service of fiscal authorities, correct data and accounting financial documents which the authorities might solicit.
- The collaboration with autochthon firms. The transnational companies must initiate and maintain close connections to national firms, thus aiding the increase of their competitiveness. This requires from the transnational companies tight, long term engagements of incorporating in the host country's economy
- The creation of jobs and increase of the autochthon work force's degree of training. Along with this, the transnational companies are invited to promote good relations with local firms and make considerable efforts to reduce the negative effects that might result in certain situations, like, for example, the effects of the present economic crisis.
- The transfer of technology. Transnational companies contribute to the increase of the host countries' competitiveness by cooperating with autochthon firms as well as with local authorities. greet

As the transnational companies extend over national borders, the obligations assumed by them on the host countries' level and especially on the host economies level, extend also. From this point of view, Kofi Annan (1999)[9] considers that the assembly of industrial operations with a social impact on implemented communities, require valences with different sense and action, derived and reunited under the shape of norms, instruments and politics, that can exert successive shaping of the behavior of local consumers and, implicitly, in the image of products manufactured on regional plan, by the resident transnational companies.

To this extent, we present a few of the politics adopted by some countries for the functioning of transnational companies[10] on their territory. In the U.S.A. a politic of "open doors" is being promoted, simultaneously with blocking some acquisitions, protecting certain areas of activity and declining unwanted investments. In Japan an administrative surveillance is being applied while it is specialized in restrictions over remigration of profits and establishment of companies of joint-ventures type, monitoring the transnational companies' activities and the thorough analysis of foreign investments. In the European Union investments are approved under the condition they do not affect the activity of its own societies and for this purpose they are being carefully supervised.

The following are among the authors devoted to explaining competitiveness under the form of cost/benefit advantages: J. Dunning (1993)[11], R. Caves (1982)[12] and S. Vogel (1997)[13]. On this matter, the argument brought by J. Dunning is interesting: "the more a transnational company cares about its advantages over property, the smaller the probability it will renounce on the control over them".

[9] Annan Kofi (1999) – A compact for the new century; New York; United Nations

[10] Bailey, D., Harte, G., Sugden, R.,- Transnationals and Governments, Routhledge, 1994

[11] Dunning J. (1993) – Multinational Enterprises and the Global Economy, Addison – Wesley.

[12] Caves R. (1982) – Multinational Enterprises and Economic Analysis, Cambridge University Press

[13] Vogel S..(1997) - International Games With National Rules: How Regulation Shapes Competition in Global Markets", Journal of Public Policy No.1, 1997

The competitiveness of transnational companies on the levels of host country and mother country's economy can be studied through the standpoint of the alliances' strategies and of the management specific to these companies, as well as through the foreign direct investments (FDI) accomplished by them.

3. The influence of economic crisis on the investments of transnational companies

American economists consider as being the source of crises the fact that: "…the markets have become too big, too complex and too dynamic to make the object of the type of surveillance and regulation of the twentieth century. No wonder that this financial globalized mammoth surpasses the power of complete understanding of even the most sophisticated participants to the market." In order to have an image on the financial system from the beginning period of the global economic crisis and in order to connect to the above quote, we present a few statistical data: Among the 50 classified financial transnational companies, 9 of them are American with a capital of 8,260 billion dollars, 6 are English with a total capital of 6,780 billion, 5 are French with a capital of 6,360 billion dollars. Germany and Japan occupy the same position with 4 other financial transnational companies, and both have a total capital of approximately 4000 billion dollars.

The erosion of the moral capital, necessary for the business environment, is also caused by some discoveries related to some corporations' corporatist frauds that are part of the 50 transnational companies on a global level. Morgan Stanley, Goldman Sachs Group Inc, Merrill Lynch % Company Inc, Citigroup Inc, Ubs Ag, Credit Suisse Group and Societe Generale are some of these transnational companies.

The changes produced nowadays in the global economy have reached such an extremely fast pace that we can expect the significant deceleration of the global economy's increase rhythm. Economists warned in 2010 that the assistance program does nothing more than delay the inevitable. Unfortunately, their predictions have been confirmed. Ireland avoided a banking crisis only by appealing to a loan of 85 billion Euros from the EU and IMF, and Portugal was forced to choose a similar solution by taking in loan 78 billion Euros. In Spain, the unemployment rate has exceeded 21%, the highest in the developed world, and Greece's public debt increased from 120% from GDP to 150% and in 2011 the state requested a new loan. Italy has already reached the point in which these states were when they requested emergency credits, from the standpoint of interests the markets required to finance the state. Volatility remains the defining word for Europe and the risk of public debt has been transferred to the banks since they have massively loaned the governments. Being integrated in a succession of consecutive phases and periods, these changes to which the international business environment has been complied to, imply an entire process of re-dimensioning and re-allocation of funds for the purpose of maintaining them on the parameters impose by the exigencies of global competitiveness[14].

The global financial and economic crisis strongly affected the evolution of international investing activities in 2008 by determining the notable decline of the foreign direct investments (FDI) flows, intercepted and generated on a global plan, after a cycle of four years of continuous increase. According to the estimations revised by UNCTAD, the value volume of the intercepted global FDI incomes had reduced to 15% in 2008, summing up to 1,659 billion USD, as opposed to the historical record from 2007, of 1,941 billion USD. The decline of FDI outcomes from 2008 was caused especially by the 29% collapse of the sales volume associated with trans-boundary fusions and acquisitions. The decrease of FDI outcomes between the period of 2008 and 2009 is the result of two

[14] Crafts Nicholas (2000) – Globalization and Growth in the Twentieth Century, IMF Working Paper, WP-00-04, IMF, Washington D.C.

major factors that affect internal market, such as international investments. Firs of all, the firms' capacity of investing was reduced by the decrease of access to financial resources, internally – due to the decline of corporative profits – as well as externally – as a result of a lesser availability and a higher cost of financing.

Second of all, the tendency to invest was negatively influenced by the economic perspectives especially in developed countries that are affected by the most severe recession of the post-war era. The impact of both factors is aggravated by the fact that at the beginning of the year 2009, a high level of perception over risk determined transnational companies to reduce their investments cost and programs, so that they will become more resistant to any deterioration of the business environment. All three major types of foreign direct investments (FDI of valorizing markets, FDI of valorizing resources, FDI of efficiency) will be affected by these factors, but in a different manor. The regression of foreign direct investments has especially affected the trans-boundaries fusions and acquisitions. The crisis's impact over the FDI differs in terms of region and sector. The developed countries have been the most affected until now, with a significant decrease of FDI outcomes in 2008, mainly because of the slow market's perspectives. The FDI outcomes continued to increase in the developing economies during 2008, however on a much slower rate than in the previous year. All developing regions, with the exception of West Asia, recorded in the year 2008 higher values of FDI incomes. Afterward, the crisis extended in size and turbulence on a large scale, thus being followed by financial markets that hit many developing and emergent economies. Emergent economies, such as Hungary, Iceland, Latvia and Ukraine needed to appeal to the International Monetary Fund (IMF) for assistance. From the beginning of 2009, this list has been extending for other countries, such as Indonesia, Pakistan and Romania. Subsequently, the crisis rapidly spread to sectors other than the financial one, with severe damage for real economy. The much more strict conditions of credit inevitably affected the companies' capacity to spend on factories and equipment, along with being able to make acquisitions. The consumers trust has roughly decreased in many states of the world, reaching historical minimum first in the United States and later on in the European Union. Also large companies from many industries were severely affected by the decrease of sales. Beginning with the financial services, which were directly affected by the crisis, the shock waves hit many other industries, from extraction and fabrication industries to infrastructure services. The foreign direct investments were in 2010 of 2,596 billion Euros, with 25,6% less than in 2009 when they reached 3,48 billion Euros.

The World Bank's rapport from January 2012 considers that, in 2012, the global economy should be sustained by an 5,4% increase in the developing countries. In spite of this, the increase will only be of 1,4% in the countries strongly industrialized. The same rapport expresses that the progression of the volume for global economic exchanges had reduced to 6,6% in 2011 (in comparison to 12,4% in the year 2010, the year of global economy re-launch) and that in 2012 it will continue to drop, reaching only 4,7%.

CONCLUSIONS

The transnational companies' competitiveness is a highly complex notion due to the fact that at present times, this type of economic agents represents entities that are in a continuous motion in the context of the internationalization process and that of changing to using global strategies. The transnational company is a complex system in which a permanent manifestation takes place regarding the contradiction between activities' flexibility and coordination. This contradiction has its origin in the very motion tendency of the firm abroad and from the permanent objective to extend its actions beyond the originating country's borders. Given the current economic context, one cannot

merely assess the competitiveness level of any given transnational company from a static standpoint, depending on the turnover, sales volume or number of employees of said company, but such assessment needs to be made from a dynamic standpoint, in close connection with the internal and international business environment in which that company carries out its activity.

The business environment of a transnational company imposes the analysis of the manifestation mode of the existing competition between these entities in the national economic area. The competitiveness represents a competition between transnational companies with the aim of occupying new positions on market outlets. Regarding the multinational corporations' competitiveness, the most suitable description was given by G.A. Frois, who considers these enterprises should think globally, but act locally.

The economic crisis obviously influences transnational companies' competitiveness and, at the same time, their decreasing competitiveness determines the adjournment of surpassing the crisis situation and re-launching economic growth. In the last years, numerous transnational companies have drastically reduced their activity, from the foreign investments standpoint, as well as from reducing production in accordance to the decreasing demand from individual and institutional consumers.

The austerity politics to which many governments were forced to resort to, have an impact on consumers (on incomes and their capacity to consume) and also on transnational companies that are no longer in resonance with them. Reducing major public investments is another loss for the transnational companies that beneficiated of state orders in multiple countries.

The European Committee is discussing today methodologies of co-sharing sovereign debts by emitting community obligations. France, and Germany especially, are opposing this. On one hand are the so-called PIGS states – Portugal, Italy, Greece and Spain – and on the other – Germany, Austria, Holland and Finland.

In this derogatory context, 2012 will unfortunately be an eminently electoral year and the following voting that will take place in 2012 may bring major changes or confirmations on a political level in many important countries, including countries that are great or regional powers, such as the USA, the Russian Federation, China and France, in smaller countries that are politically important through their resources and strategic positions hold, and in the Arab states (Egypt, Libya, possibly Syria or Iraq), Eastern Asia (Taiwan), the Euro zone or Eastern Europe and from the formal Soviet Union (Greece, Italy, Slovakia, Serbia, Romania, Ukraine, Georgia and Moldavian Republic), might decisively mark the geopolitical configuration of Europe and the rest of the world. Under these conditions it is highly unlikely for the said governments to establish radical reforms that could bring electoral losses. The lack of economic measures will reflect on transnational companies from the mother states as well as from host states.

References

- Annan Kofi (1999) – A compact for the new century; New York; United Nations;
- Bailey, D., Harte, G., Sugden, R.,- Transnationals and Governments, Routhledge, 1994;
- Caves R. (1982) – Multinational Enterprises and Economic Analysis, Cambridge University Press;
- Ciochină Iuliana, Voiculeț Alina (2004) – The firm's competitiveness from an European perspective, paper sustained at the International Economic Conference - Lucian Blaga University, Sibiu, 2004;

- Crafts Nicholas (2000) – Globalization and Growth in the Twentieth Century, IMF Working Paper, WP-00-04, IMF, Washington D.C.;
- Dan Vasile – *Industrial and competitive strategies and structures*, All Educational Publishing House. Bucharest, 1997;
- Dunning J. (1993) – Multinational Enterprises and the Global Economy, Addison – Wesley.;
- Held David, Mc Grew Anthony, Goldblatt David and Perraton Jonathan (2004) – Global changes: politics, economy and culture Polirom Publishing House, Iaşi;
- Hill Charles (1998) - International Business: Competing in the Global Marketplace, McGraw-Hill Companies; 2nd edition (July 2, 1998);
- Hugues Kirsty (1993), European Competitiveness, Cambridge University press, pg. 5;
- Porter Michael (1987) – From competitive advantage to corporate strategy, Harvard Business. Review, no 3, 1987;
- Strage S.(1997) – The Retreat of State, Cambridge University Press;
- Vogel S..(1997) - International Games With National Rules: How Regulation Shapes Competition in Global Markets", Journal of Public Policy No.1, 1997;
- World Bank rapport – January 2012

BUSINESS OFFSHORING IMPLICATIONS ON THE LABOUR MARKET

Serghei MĂRGULESCU[*]
Elena MĂRGULESCU[**]

Abstract

In terms of economic policy, three new aspects are important in the current context of globalization which brings forward new strategies regarding the outsourcing and offshoring of activities and functions of the value chain. These aspects refer to the instant appearance of an offshore transferable function , to the unpredictability of winning and losing functions and to the lowering of competition from the levels of sector, company or professional qualification category to an individual level.. Of the three features, the most problematic for policy makers is the unpredictability of the impact of globalization. For example, in Europe we can not reasonably believe that workers in the most competitive sectors will be in a position of winners, nor that these winners will be the most prepared or trained in analytical functions. Many European workers currently work at prices fixed by the local market and not covered by productivity. But when the competition on functions will expand through globalization outside the country or area, their choices will be either a job loss or a reduction in salary. The question that will be raised ever insistently will be the following: what jobs are more exposed to this new competition? On the one hand, offshoring is on balance positive for Western economies, because it makes domestic companies more competitive. At the same time the material outsourcing is, for most developed economies, much more important than the outsourcing of services and the implications for labor market must be objectively differentiated in the two sectors. On the other hand, if we take into account the amplification of the effects that offshoring already has on the structure and distribution of labor, the socio-economic European policy of labor orientation to the coordinates of a "knowledge based" economy and to the jobs of the "information society" could be wrong.

Keywords: *outsourcing, offshoring, labor market, competition, education*

Introduction

In recent years, a host of famous economists in the study of international economics and social issues, argued, in one way or another, the idea that globalization has entered a new phase. As Professor Gene Grossman from the Princeton University said, this phase is so different from previous ones, that its understanding claims even a new paradigm.

In an article published in 2006, Professor Richard Baldwin from the Institute of International Studies in Geneva[1] is trying to clarify the paradigms of the old and the new globalization, analyzing the phenomenon as a long process, characterized by two major " unbundlings ".

[*]Professor, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest, Romania, (e-mail: margulescu@univnt.ro).

**Senior Lecturer, Ph.D., Faculty of Economic Sciences "Nicolae Titulescu" University, Bucharest, Romania, (e-mail: elena.margulescu@univnt.ro)

1 "Globalisation:The Great Unbundling(s)" – article published in the report "Globalisation Challenges for Europe" of the Secretariat of the Economic Council of the Government of Finland, march 2006.

The first unbundling, driven by rapid drop in transportation costs, has put an end to the need of manufacturing the products near the areas of consumption, allowing the spatial separation of factories and consumers. The basic levels at which globalization spread its effects were firms and economic sectors.

The second unbundling was driven by significant reduction, in the last decade, in the costs of communication and coordination of activities in the international space, which ended the need to perform most phases of production in close proximity. Also, more recently, period, a further decoupling of activities or functions of the company (besides the production) has taken place, by offshoring the service sector activities. Thus, the second unbundling has dissociated in space factories and offices and drew the global competition to the level of functions that these structures previously retained. This unbundling can be found under names such as fragmentation, offshoring, vertical specialization and segmentation of the value chain.

Marketing of products is replaced by marketing of functions, including those individually performed, which lowers the overall competition at the level of individual workers in manufacturing or services, which perform similar tasks in different countries.

The second unbundling triggered by globalization

By the mid '80s globalization was developed exclusively at the level of companies and industries. Though savings could be achieved by transferring labor intensive activities to the South, production bases were maintained in individual locations in the North, to facilitate coordination of activities of managers and workers. Both financial considerations and those of coordination made sense to coupling labor, capital and European technology right in Europe, despite salary differentials.

The geographical separation of the different bases of production has become more attractive with the growing wage gap, adjusted for productivity and for the cheaper cost of fragmentation through the reduction of telecommunications and air transport costs. The importance of distance, especially on travel costs of managers and skilled workers results also from the fact that the first major unbundlings in industry started in the mid 80s, on short geographical distances: Japan to Southeast Asia and the U.S. to Mexico.

This trend was pejoratively called "the voiding" of the Japanese economy. The differentiation of countries in headquarters- countries and production host- countries has increased further by practicing the same " voiding " by countries like Taiwan, Korea, Singapore and Hong Kong. China's readiness to integrate into the global economy in the '80s spurred offshoring's strong appeal.

More recently, the second unbundling was reflected also in the field of "offices", by outsourcing functions that were previously regarded as nonmarketable. The classic example are the American call- centers in India.

Meanwhile, the latest unbundling process is found in the services area. This is in rapid expansion, although at a smaller scale.

The result of these processes of unbundling functions and tasks is the transfer of competition to the level of production phases, tasks of departments and duties of individual employees. Also, competition may affect functions which are common to a large number of sectors, regardless of their characteristics, namely labor intensive or capital-intensive. In conclusion, the North losers of globalization are not anymore just industries or activities that are labor intensive. Because transportation costs do not vary significantly, depending on the nature of goods, we can say that the reduction of these costs affects likewise all sectors.

For functions, the situation is different. Some of these, such as truck driving, are completely uninfluenced by lower international costs of coordination, while others are strongly affected, such as call- center services.

In terms of economic policy, three new aspects become important:

- the unpredictability of the winning and the losing functions. At present, even economists have difficulty in understanding the glue that unites the various functions in "packages" (of factories and offices), and thus how they will be removed in future.

- the instantaneous appearance of an offshore transferable function, due to the differential impact of the reduction in telecommunications costs on various functions and development of new management technologies.

- the lowering of competition from the levels of sector, company or professional qualification category to an individual level.

Implications of offshoring on the labor market

Of the three features mentioned above, the most problematic for policy makers is the unpredictability of the impact of globalization. For example, in Europe we can not reasonably believe that workers in the most competitive sectors will be in a position of winners, nor that these winners will be the most prepared or trained in analytical functions. Many European workers currently work at prices fixed by the local market and not covered by productivity. But when the competition on functions will expand through globalization outside the country or area, their choices will be either a job loss or a reduction in salary. The question that will be raised ever insistently will be the following: what jobs are more exposed to this new competition?

Already in 1996 P. Krugman[2] warned that the differentiation will operate not due to the education level of workers, but due to the entering of the various services in the category of marketable services. This point of view was recently taken over by other authors, such as A.S Blinder (2006)[3] or G. Grossman and E. Rossi-Hansberg (2006)[4]. The latter's analyzed the implications of offshoring in general, and especially on wages, in terms of three effects: the effect of business conditions, the effect of employment and , the effect of productivity.

The first effect of production offshoring to countries with lower wages is to reduce product prices on international markets. This price will trigger the reduction of wages in the country of origin, remaining in the same sector. Their salary will be reduced also by the decreased demand for jobs in the sector. In reality, workers in the country of origin will focus on functions involving higher productivity, in order to increase the salary in accordance with this productivity. Of course the productivity effect may be exceeded by the cumulative effect of business and employment conditions, but Grossmann and Rossi-Hansberg paradigm allows the following important conclusion: if commodity prices fall and offshoring is not allowed, the workers in the country of origin will face even higher wage cuts.

Offshoring refers, in this case, to the routine (both normal routine, and cognitive routine) functions (tasks). In contrast, non-routine functions involving face-to-face interaction and continuous optimization and revaluation are not unboundling. An American study from 2003 shows that the share of jobs with routine functions declined since 1970 and this trend accelerated after 1990.

[2] Krugman P.(1996): "White Collars Turn Blue" Article for centennial issue of the NYT magazine.
[3] Blinder A.S. (2006): "Offshoring: The Next Industrial Revolution?"
[4] Grossman G. & Rossi-Hansberg E. (2006): "The Rise of Offshoring:It's Not Wine for Cloth Anymore".

Simultaneously, the share of non-routine job rised. This study urged Grossman and Rossi-Hansberg to say that the offshoring of routine functions is already underway.

Two examples of North-South tradable and non-tradable functions are provided by A.S.Blinder (2006)[5]. The first category includes, for example, taxi drivers in Sweden and India. Prices of these functions are set locally and no matter how small would be the difference in productivity between two taxi drivers in these countries, it can not influence their relative wages, because it does not create competition between the functions performed by these drivers on the two markets.

An example of until recently non-marketable functions, are the computer security or informatic systems analysts. Many routine activities in this area can be provided remotely now. Remotely means another floor the same building or another office in Germany, either, due to the lower costs of communication and management technologies, a company in India. This option puts the Germans and Indian computer workers in direct competition with the very important consequence that the German-Indian wage differential has to be justified now also by a compensating differential in productivity.

However the difference should be made between the services sector and the trade in goods sector, thus involving industrial area, where it is considered (R. Baldwin 2006[6]) that the North-South wage differential has been brought more or less in line with the productivity differential.

A massive offshoring of jobs in production with intensive use of labor had taken place between Japan and China, and this has led to a significant increase of the international competitiveness of Japanese industry, even without any noticeable impact on unemployment. Japanese workers have rapidly specialized in new functions that maintained the productivity gap against Chinese workers, abundantly justify the wage gap towards them.

Regarding the U.S. market, A. Bardhan and C. Kroll (2003)[7] estimated that about 10% of the U.S. workforce was employed in occupations that can be transferred offshore, such as financial analysts, medical technicians, computer and math specialists

D. Van Welsum and X. Reif (2005)[8] and D. Van Welsum and G. Vickery (2006)[9] define tradable and offshorable jobs as those characterized by the following four characteristics:

- To be IT intensive
- Results to be IT-transmittable,
- Functions to be encodable,
- To require little face-to-face interaction.

Based on this definition, they found that about 20% of the American workforce could be offshored.

Studying the occupational statistics C. Mann (2005)[10] shows that most affected were the low-wage American workers in IT institutions, about one third of the jobs disappearing in the 1999-2004 period, despite the very low wages ($ 25,000 on average per year). This includes occupations such as telemarketing, telephone operators, computer operators, etc..

In antithesis stood the occupations implying high skills, reasoning and solving problems, in which wages are three times higher, and which have offered 17% more jobs in the same period.

[5] Blinder A.S. (2006): "Offshoring: The Next Industrial Revolution?"

[6] R. Baldwin (2006): "Managing the Noodle Bowl: : The Fragility of East Asian Regionalism".

[7] Bardhan A & Kroll C. (2003):"The New Wave of Outsourcing: Fisher Center for Real Estate and Urban Economics, University of California".

[8] Van Welsum D. & Reif X. (2005): "Potential Offshoring: Evidence from Selected OECD Countries".

[9] Van Welsum D. & Vickery G. (2006): "The Share of Employment Potentially Affected by Offshoring – an Empirical Investigation".

[10] Mann C. (2005):"Accelerating the Globalisation of America. Institute for International Economics."

Regarding the situation in Europe, the study prepared by M.Falk and Y. Wolfmayer (2005)[11] estimated that due to offshoring about 0.3% of jobs in the industry were lost annually during 1995-2000, with sensitive differences between sectors, but, in some of the most dynamic of them, no losses of jobs due to offshoring have been recorded.

K.Ekkholm and Hakka K. (2006)[12] conducted an analysis of the effects of offshoring of intermediate productive inputs on the labor force in Sweden and found that:

- Offshoring to low-income countries has reduced demand for workers with average level of education;

- Offshoring to high-income countries (mainly in the case of Sweden) did not produce statistically significant effects on the workforce.

Also, other studies for Germany, such as, for example, those of M Falk and Koebel (2003), show that offshoring reduces the demand for medium skilled workers.

Another type of analysis attempts to show what type of outsourcing has greater effects on developed countries. In this respect M. Amiti and SJWei (2005)[13] analyzed the statistics on trade in services of the U.S. and other industrialized countries, in the period 1983-2003, concluding that:

- Outsourcing of services has increased significantly in recent years but it is not still an important phenomenon (eg for U.S. imports of IT and business services in 2003 represented only 0.4% of GDP).

- U.S. and other developed countries are net exporters of IT and business services, the surplus increasing even for some of these countries (ie USA).

- the material outsourcing is far more important than the outsourcing of services.

A recent study prepared by H.Goerg, D.Greenaway and R. Kneller (2008)[14] points out some implications of offshoring on the U.K economy. Research has covered a total of 66,000 companies and, after they found that offshoring is practiced mostly by large companies with branches abroad, focused on the 2850 British multinationals with foreign subsidiaries.

Thus, during 1995-2004, the offshoring of these companies increased by 35% in production and 48% in services. But even after this increase, it was still below 5% of GDP in 2004. Despite the somewhat automatic association of offshoring with the call centers in India, only 4.5% of multinationals in services and 8% in the industrial sector had branches in India and China. Most of the international outsourcing is done in other developed countries, and primarily in the EU.

An essential problem is related to the offshoring's impact on unemployment, but unlike media exaggerations, the study in question found that in 2005, only 3.5% of the jobs lost in England can be attributed to offshoring . Simultaneously, however, companies could produce more because offshoring made them more competitive and thus, overall, have created more jobs than were lost. In the analyzed period there were added due to offshoring about 100,000 new jobs.

A negative impact of offshoring and more generally of globalization is considered to be the alleged phenomenon of wage cuts in developed countries. The study to which we refer does not discover such an effect in the industrial sector, but in the services sector it is however found some average decrease. The explanation seems to lie in the fact that companies in the services sector outsource more qualified and better paid work. But the reduction was small and by extrapolation it was estimated that if the offshoring will continue to grow at the same rate in a decade, the average salary in services will directly shrink with only 2%.

---

[11] Falk M. & Wolfmayer Y. (2005):"The Impact of International Outsourcing on Employment: Empirical Evidence from EU Countries. Austrian Institute od Economic Research Paper".

[12] Ekholm K. & Hakkala K. (2006): "The Effect of Offshoring on Labour Demand: Evidence from Sweden".

[13] Amiti M & S.J. Wei (2005):"Fear of Service Outsourcing:Is It Justified? Economic Policy".

[14] Goerg H., Greenaway D. & Kneller R. (2008):" The Economic Impact of Offshoring. Nottingham University's Globalisation and Economic Policy Centre".

The conclusion of the study is optimistic through the fact that offshoring is on overall positive for the economy because it makes companies more competitive and generate jobs in the country and abroad.

Conclusions

In terms of socio-economic impact of policies promoted at EU level, we have to emphasize the idea brought into question since 1996 by Paul Krugman[15] and reiterated by Alan Blinder (2006) and R. Baldwin (2006), that the European economic policy of orientating the workforce in accordance with the coordinates of a " knowledge based economy " and with "information society" jobs could be wrong.

If the offshoring trend in the services sectors is maintained, many analytical jobs, which today seem to have a high value added could be outsourced to other countries. Overall, such offshoring will be an opportunity for Europe to improve productivity, but the investments in qualification of workers would be unnecessary. Emphasis on analytical skills should be at least doubled by a similar emphasis placed on the ability to be flexible and to learn new skills. The most important conclusion for educational policies becomes that that is more important for future generations to learn how to learn than to teach skills in a particular field. The educational system must prepare them for lifetime employability, and not for lifetime employment.

Also, the employees protection policies become more feasible than workplaces protection policies. Offshoring will become more attractive to companies located in countries with more powerful social policies of jobs protection because, ultimately, offshoring gives companies the flexibility they need to go out of the rigidity of legal schemes in the country of origin .

As for Romania, starting from the analysis of the factors that favor offshoring decisions internationally, but also from the strategies of TNCs present in the country, that would not be late to predict the evolution of Romania in terms of offshoring host of activities and functions and also as source of offshoring. The logical purpose of such a study would be the development of appropriate strategies and policies in the labor market area, and the rethinking of the foundations of the Romanian educational system of tomorrow.

References

- "Globalisation:The Great Unbundling(s)" – article published in the report "Globalisation Challenges for Europe" of the Secretariat of the Economic Council of the Government of Finland, march 2006.
- Krugman P.(1996): "White Collars Turn Blue" Article for centennial issue of the NYT magazine.
- Blinder A.S. (2006): "Offshoring: The Next Industrial Revolution?"
- Grossman G. & Rossi-Hansberg E. (2006): "The Rise of Offshoring:It's Not Wine for Cloth Anymore".
- Blinder A.S. (2006): "Offshoring: The Next Industrial Revolution?"
- R. Baldwin (2006): "Managing the Noodle Bowl: : The Fragility of East Asian Regionalism".

[15] Krugman P (2006) "White Collars turn Blue" – NYT magazine.

- Bardhan A & Kroll C. (2003):"The New Wave of Outsourcing: Fisher Center for Real Estate and Urban Economics, University of California".
- Van Welsum D. & Reif X. (2005): "Potential Offshoring: Evidence from Selected OECD Countries".
- Van Welsum D. & Vickery G. (2006): "The Share of Employment Potentially Affected by Offshoring – an Empirical Investigation".
- Mann C. (2005):"Accelerating the Globalisation of America. Institute for International Economics."
- Falk M. & Wolfmayer Y. (2005):"The Impact of International Outsourcing on Employment: Empirical Evidence from EU Countries. Austrian Institute od Economic Research Paper".
- Ekholm K. & Hakkala K. (2006): "The Effect of Offshoring on Labour Demand: Evidence from Sweden".
- Amiti M & S.J. Wei (2005):"Fear of Service Outsourcing:Is It Justified? Economic Policy".
- Goerg H., Greenaway D. & Kneller R. (2008):" The Economic Impact of Offshoring. Nottingham University's Globalisation and Economic Policy Centre".
- Krugman P (2006) "White Collars turn Blue" – NYT magazine.

EU COMPARISON OF VAT

Maria Zenovia GRIGORE [*]
Mariana GURĂU [**]

Abstract

VAT is one of the newest tools of the global economy and is widely adopted in most of the countries. For EU Member States is required not only the existence of VAT, but also that its main characteristics to be uniformly implemented. This should facilitate intra-Community transactions, but in practice does not as there are many local variations which can lead to costly errors and penalties. The objective of this paper is to collate data about the main characteristics of VAT in EU Member States and to highlight the key differences between them. This survey shows that there continue to be opportunities and risks for businesses trading cross border, as a result of differences in application of Community legislation on VAT. This led to the necessity of VAT reform. On this basis, the Commission adopted on the end of the last year a Communication on the future of VAT. This sets out the fundamental characteristics that must underlie the new VAT regime, and priority actions needed to create a simpler, more efficient and more robust VAT system in the EU.

Keywords: *VAT standard rate, VAT registration threshold, distance selling, VAT recovery, principle of destination.*

Introduction

Fiscal policies represent an important lever for the support of a sustainable economic growth and for public finances consolidation. It is important that the European fiscal system becomes effective, efficient and correct, especially regarding the VAT European system given the fact that at present, the VAT constitutes one of the main sources of revenues for the Member States budgets.

One of the conditions to accede to the EU is that the main characteristics and rules regarding VAT be uniformly implemented. The objective of this request is to simplify the taxation of intra-community transactions, but in practice this thing is not possible because of different local VAT regulations and foreign languages assessing the compliance of some operations. In the first part of the work, we shall emphasize these differences which are especially related to the level of VAT rates, thresholds of VAT and foreign companies VAT recovery.

In the second part of the work, we shall analyze the recent initiatives of European Commission regarding the creation of a more efficient, stronger and simpler VAT system. This system should reduce the operational costs for companies and administrative charges of authorities, fighting at the same time against fraud which represents a considerable burden for public finances and for consumers.

[*] Associate Professor, Ph.D., Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest, Romania, (e-mail: mgrigore@univnt.ro).

[**] Senior Lecturer, Ph.D. candidate, Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest, Romania, (e-mail: mgurau@univnt.ro).

1. Comparison of VAT in Member States of European Union

The main normative act of VAT is Council Directive 2006/112/EC on the common system of value added tax, which is a recast of the Sixth VAT Directive of 1977. This normative act pursues to establish a general frame as VAT systems of Member States be compatible. The Directive establishes mandatory rules for all states, but some aspects are left in care of Member States which can have thus a certain degree of decision.

For example, the mandatory rules deal with the definition of taxable operations, taxable persons, VAT rules in case of intra-Community aquisition and supply, VAT tax base etc. Uniformity of VAT tax base is necessary taking into account the obligation of EU Member States to contribute to the Union budget with a part of collected VAT, a contribution which is calculated by application of a percentage rate upon the tax base.

One of the most significant differences between the VAT systems of Member States refers to VAT rates. Besides the standard VAT rate, another three rates are applied: reduced rate, over-reduced rate and parking rate. *Table no. 1* presents the four VAT rates applied in EU Member States at 1st of January 2012.

Table no. 1. VAT rates in EU Member States (%)

	Standard rate	Reduce rate	Super reduce rate	Parking rate
Belgium	21,0	6/12	-	12
Bulgaria	20,0	9	-	-
Czech Republic	20,0	14	-	-
Denmark	25,0	-	-	-
Germany	19,0	7	-	-
Estonia	20,0	9	-	-
Ireland	23,0	13,5	4,8	13,5
Greece	23,0	6,5/13	-	-
Spain	18,0	8	4	-
France	19,6	7	2,1	-
Italy	20,0	10	4	-
Cyprus	15,0	5/8	-	-
Latvia	22,0	12	-	-
Lithuania	21,0	5/9	-	-
Luxembourg	15,0	6/12	3	12
Hungary	27,0	5/18	-	-
Malta	18,0	5/7	-	-
Netherlands	19,0	6	-	-
Austria	20,0	10	-	12
Poland	23,0	5/8	-	-
Portugal	23,0	6/13	-	13
Romania	24,0	5/9	-	-
Slovenia	20,0	8,5	-	-

Slovakia	20,0	10	-	-
Finland	23,0	9/13	-	-
Sweden	25,0	6/12	-	-
United Kingdom	20,0	5	-	-

Source:

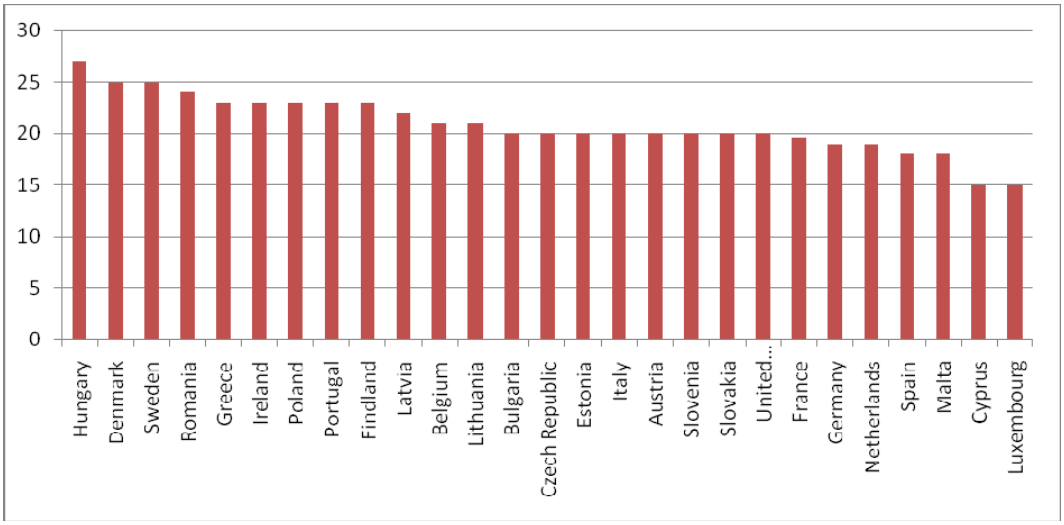
http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2011/report_2011_en.pdf

http://www.vatsystems.eu/index.php/news/show_prev_news/12/2011

The minimum standard rate in EU is established to 15%, each Member state having the liberty to establish the rate considered appropriate for its budgetary necessities. This minimum rate helps to avoid substantial variations in Member States' VAT rates which could lead to distortions of competition between high and low rate countries and put the smooth functioning of Single Market at risk.

Hungary practise the biggest standard rate of TVA from EU: 27%. The rate of 25%, the second as size in EU, is applied in Denmark and Sweden. Romania was till the 1st of July 2010 in the group of middle states with a rate of 19%, but now it occupies third place in the classification of EU Member States with a rate of 24%. The most relaxed taxation regarding VAT is found in Cyprus and Luxembourg, countries which practise the minimum rate of 15% (graph no. 1).

Graph no. 1. VAT standard rates in the Member States



According to the data from table no. 2, between 2000 and 1st of January 2012, the VAT standard rate remained unchanged in 8 Member States (Belgium, Bulgaria, Denmark, France, Italy, Luxembourg, Austria and Sweden), rose in 17 Member States and diminished only in Slovakia (from 23,0% in 2000 to 19,0% in 2012) and Czech Republic (from 22,0% to 20,0%). The highest rises were registered in Greece (from 18,0% to 23,0%) and Cyprus (from 10,0% to 15,0%).

Table no. 2. Evolution of the standard rate of VAT (%)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
EU-27 average	**19,2**	**19,3**	**19,5**	**19,5**	**19,4**	**19,6**	**19,4**	**19,5**	**19,4**	**19,8**	**20,4**	**20,7**	**20,9**
Belgium	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0
Bulgaria	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Czech Republic	22,0	22,0	22,0	22,0	19,0	19,0	19,0	19,0	19,0	19,0	20,0	20,0	20,0
Denmark	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0
Germany	16,0	16,0	16,0	16,0	16,0	16,0	16,0	19,0	19,0	19,0	19,0	19,0	19,0
Estonia	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	20,0	20,0	20,0	20,0
Ireland	21,0	20,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,5	21,0	21,0	23,0
Greece	18,0	21,0	21,0	21,0	21,0	19,0	19,0	19,0	19,0	19,0	23,0	23,0	23,0
Spain	16,0	16,0	16,0	16,0	16,0	16,0	16,0	16,0	16,0	16,0	18,0	18,0	18,0
France	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6
Italy	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Cyprus	10,0	10,0	13,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0
Latvia	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	21,0	21,0	22,0	22,0
Lithuania	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	19,0	21,0	21,0	21,0
Luxembourg	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0
Hungary	25,0	25,0	25,0	25,0	25,0	25,0	20,0	20,0	20,0	25,0	25,0	25,0	27,0
Malta	15,0	15,0	15,0	15,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0
Netherlands	17,5	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0
Austria	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Poland	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	23,0	23,0
Portugal	17,0	17,0	19,0	19,0	19,0	21,0	21,0	21,0	20,0	20,0	21,0	23,0	23,0
Romania	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	24,0	24,0	24,0
Slovenia	19,0	19,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Slovakia	23,0	23,0	23,0	20,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	20,0	20,0
Finland	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	23,0	23,0	23,0
Sweden	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0
United Kingdom	17,5	17,5	17,5	17,5	17,5	17,5	17,5	17,5	17,5	15,0	17,5	20,0	20,0

Source:

http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2011/report_2011_en.pdf

http://www.vatsystems.eu/index.php/news/show_prev_news/12/2011

Under the pressure of the financial crisis, more European countries resorted last years to the enhancement of standard rate.

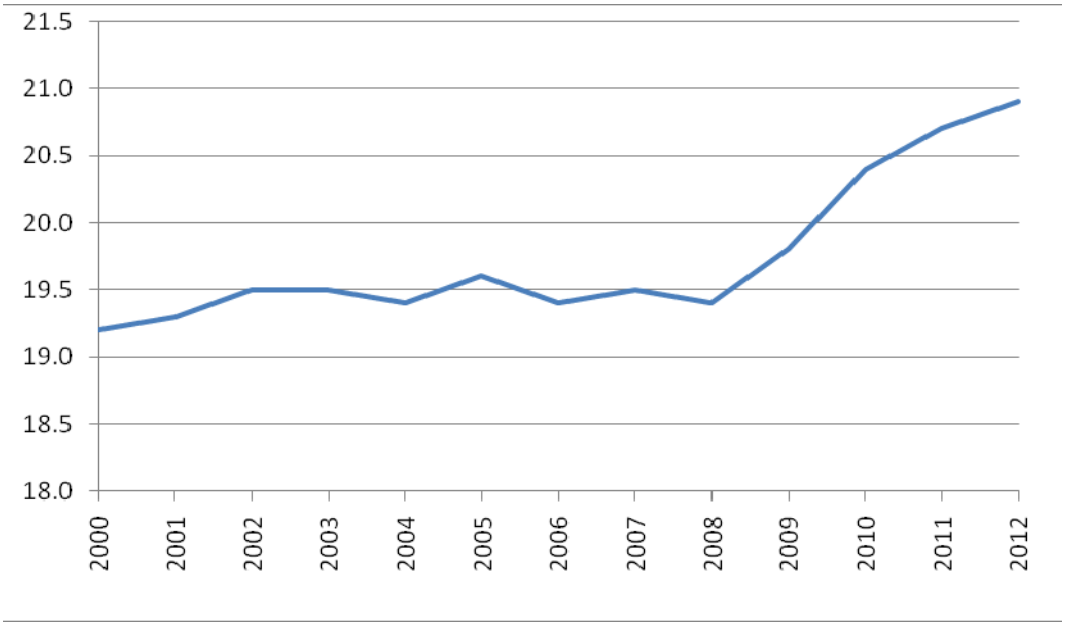
In 2010 Greece increased the VAT rate with four percentages, but in two stages. The first increase was from 19% to 21% and the second till 23%. In exchange, Spain increased the VAT rate

only with two percentages from 16% to 18%. Also, Finland increased in 2010 the VAT rate but only with one percentage from 22% to 23%. Also, the VAT rate increases with one percentage in Portugal from 20% to 21% in 2010 while in 2011 it increases till 23%. In 2011, increases of VAT rate of one percentage have taken place in Latvia, Poland and Slovakia. On the 1st of January 2011, Great Britain increased the VAT rate from 17,5 % to 20%.

The only country which increased the VAT rate with 5 percentages like Romania is Hungary. The Hungarian government increased in 2009 the VAT rate from 20% to 25%. From the 1st of January 2012, two countries increased the VAT rate with 2 percentages: Ireland from 21% to 23% and Hungary from 25% to 27%.

According to the data from table no. 2, in EU-27 the VAT standard average rate rose from 19,8% in 2009 to 20,2% in 2010, 20,7% in 2011 and 20,9% in 2012. As compared to 2000, in 2012 the rise of VAT average rate was of 1,7% (Graph no. 2).

Graph no. 2. Evolution of the standard rate of VAT (EU-27 average)



Member States have the option of applying one or two reduced rates to a restricted list of goods and services. The reduced rate cannot be less than 5% and the list of eligible goods and services must be strictly interpreted. As we can see in table no. 1, the differences between Member States are substantial: 12 states have one reduced rate, 14 states have two reduced rates and Denmark is the single state which doesn't have reduced rate. The minimum reduced rate of 5%, value imposed by European Directives, is found in Cyprus, Latvia, Hungary, Malta, Poland, Romania and Great Britain. The highest values of reduced rate are found in Hungary (18%), Czech Republic (14%), Ireland (13.5%), Greece, Portugal and Finland (13%).

Not only the value of reduced rates differs from one state to another, but also the categories of goods and services for which these rates are applied. There are 21 of such categories among which we enumerate: foodstuffs, medicines, medical equipment for the disabled, books on all physical

means of support, newspapers, periodicals, passenger transport, admission to shows, theatres, museums, etc.

The variety of reduced VAT rates brings a new level of complexity to intra-community transactions, leading to additional compliance costs. In spite of all this, for those who seek more advantageous situations, these differences can be used as opportunities worthy to be taken into consideration when they chose the country where they are going to open their business.

Over-reduced rates (lower than 5%) are applied only in five states: Spain (4%), France (2.1%), Ireland (4,8%), Italy (4%) and Luxemburg (3%), for goods and services as: food products, pharmaceuticals, books, newspapers, periodicals, television license fees, supply of new buildings, medical equipment for disabled persons etc.

A characteristic met among EU states is represented by the parking rate, which is a special VAT rate applied in five Member States (12% in Belgium, Austria, Luxemburg; 13% in Portugal; respectively 13,5% in Ireland) for certain goods as: certain energy products, certain wines, washing and cleaning products, printed advertising matter, tourism publications etc.

According to the table no. 3, European legislation provides three thresholds of TVA: for small enterprises (column A), for intra-Community acquisition accomplished by taxable persons not entitled to deduct input tax and by non-taxable legal person (column B) and for distance selling (column C).

Table no. 3. VAT Thresholds (September 2011)

Country	A. Exemption for small enterprises (annual turnover)		B. Threshold for non-taxable intra-Community acquisition (annual value of intra-Community acquisitions)		C. Threshold for application of the special scheme for distance selling (annual value of distance selling)	
	National currency	Euro equiva-lent	National currency	Euro equiva-lent	National currency	Euro equiva-lent
Belgium	5.580 euro	-	11.200 euro		35.000 euro	
Bulgaria	50.000 BGN	25.565	20.000 BGN	10.226	70.000 BGN	35.791
Czech Republic	1.000.000 CZK	40.851	326.000 CZK	13.318	1.140.000 CZK	46.570
Denmark	50.000 DKK	6.707	280.000 DKK	6.500	280.000 DKK	37.557
Germany	17.500 euro	-	12.500 euro	-	100.000 euro	-
Estonia	15.978 euro	-	10.226 euro	-	35.151 euro	-
Ireland	75.000 euro or 37.500 euro	-	41.000 euro	-	35.000 euro	-
Greece	10.000 euro or 5.000 euro	-	10.000 euro	-	35.000 euro	-
Spain	None	None	10.000 euro	-	35.000 euro	-
France	81.500 euro or 32.600 euro	-	10.000 euro	-	100.000 euro	-
Italy	30.000 euro	-	10.000 euro	-	100.000 euro	-
Cyprus	15.600 euro	-	10.251 euro	-	35.000 euro	-
Latvia	35.000 LVL	49659	7.000 LVL	9.932	24.000 LVL	34.052

Lithuania	100.000 LTL	28.962	35.000 LTL	10.137	125.000 LTL	36.203
Luxembourg	10.000 euro	-	10.000 euro		100.000	
Hungary	5.000.000 HUF	18.328	2.500.000 HUF	9.164	8.800.000 HUF	32.257
Malta	35.000 euro or 24.000 euro or 14.000 euro	-	10.000 euro	-	35.000 euro	-
Netherlands	None	None	10.000 euro	-	100.000 euro	-
Austria	30.000		11.000 euro	-	35.000 euro	
Poland	150.000 PLN	37.774	50.000 PLN	12.592	160.000 PLN	40.293
Portugal	10.000 euro or 12.500 euro	-	10.000 euro		35.000 euro	
Romania	119.000 RON	28.249	34.000 RON	8.071	118.000 RON	28.012
Slovenia	25.000 euro	-	10.000 euro	-	35.000 euro	-
Slovakia	49.790 euro	-	13.941,45 euro	-	35.000 euro	-
Finland	8.500 euro	-	10.000 euro	-	35.000 euro	-
Sweden	None	-	90.000 SEK	10.190	320.000 SEK	36.232
United Kingdom	70.000 GBP	81.843	70.000 GBP	81.843	70.000 GBP	81.843

Source:
http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/traders/vat_community/vat_in_ec_annexi.pdf

Small enterprises, meaning entrepreneurs whose turnover (plus the value-added tax on it) has not exceeded the legal threshold in the preceding calendar year and is not expected to exceed this threshold in the current year, do not need to pay value-added tax. According to the data from *table no. 3*, column A, this threshold varies between 5.580 euro (Belgium) and 81.843 euro (United Kingdom). There are only three Member States not applying the special exemption for small enterprises: Spain, Netherlands and Sweden.

For simplification reasons, goods acquired by taxable persons not entitled to deduct input tax and by non-taxable legal person are not subjected to VAT if annual acquisitions are below an annual turnover threshold set by their Member State, though it is still possible to opt for taxation.[1] This threshold varies between 8.071 euro, in Romania, and 81.843 euro, in United Kingdom (table no. 3, column B).

Regarding distance sale, differences appear although theoretically it should be used either the minimum threshold of 35.000 euro or the maximum one of 100.000 euro. In spite of all this, as we can notice in *table no. 3,* column C, this request wasn't applied and implemented uniformly in those 27 states.

The great variations regarding these three thresholds of TVA can represent a real trap for many entrepreneurs who wish to develop their businesses in different Member States.

Even for companies which know their responsibilities regarding VAT registration and payment, the differences regarding the reporting periods specific to each country, as well as those regarding the order of declarations which must be submitted every month, quarter or year, create great problems (*table no. 4)*.

[1] M. Z. Grigore, M. Gurău, *Fiscalitate. Noţiuni teoretice şi lucrări aplicative*, Cartea Studenţească Publishing House, Bucharest, 2009

Table no. 4. Fiscal period of VAT

Country	Fiscal period	Annual VAT declaration deadline
Belgium	Monthly / Quarterly	Not Applicable
Bulgaria	Monthly	Not Applicable
Czech Republic	Monthly / Quarterly	Not Applicable
Denmark	Monthly / Quarterly / Biannually	Not Applicable
Germany	Monthly / Quarterly	May
Estonia	Monthly	Not Applicable
Ireland	Biannually / Annually	Not Applicable
Greece	Monthly / Quarterly	10 May
Spain	Monthly / Quarterly	January
France	Monthly / Quarterly	Not Applicable
Italy	Monthly / Quarterly	Not Applicable
Cyprus	Quarterly	Not Applicable
Latvia	Monthly / Quarterly / Biannually	1 May
Lithuania	Monthly / Quarterly / Biannually	Not Applicable
Luxembourg	Monthly / Quarterly / Annually	May
Hungary	Monthly Quarterly Annually	Not Applicable
Malta	Quarterly	March
Netherlands	Monthly / Quarterly / Annually	March
Austria	Monthly / Quarterly	April
Poland	Monthly / Quarterly	Not Applicable
Portugal	Monthly / Quarterly	15th July
Romania	Monthly / Quarterly / Biannually / Annually	Not Applicable
Slovenia	Monthly / Quarterly	Not Applicable
Slovakia	Monthly / Quarterly	N/A
Finland	Monthly	Not Applicable
Sweden	Monthly / Quarterly / Annually	Not Applicable
United Kingdom	Monthly / Quarterly / Annually	Not Applicable

Source: http://www.agn-europe.org/htm/firm/news/ttf/2011/2011_vat_web.pdf

The fiscal period varies depending mostly on the overall turnover of the previous year, but also depending on VAT payment of precedent or current fiscal year (Hungary and Netherland), or depending on type of taxable person. Only 9 of the 27 EU Member States are required to submit an annual statement of VAT.

Since 1st January 2010, the procedure for reimbursement of VAT incurred by EU taxable persons in Member States where they are not established has been replaced by a new fully electronic procedure, thereby ensuring a quicker refund to claimants. The previous paper-based procedure was slow, cumbersome and costly. The new procedure better facilitates taxable persons and improves the functioning of the internal market. A new feature is that taxable persons will be paid interest if Member States are late making refunds.

The data from *table no. 5* suggest that the new procedure determined the improvement of VAT recovery time as a result of the fact that many Member States joined the statutory term of 4 months.

Table no. 5. Foreign Company VAT Recovery

%	Claim time limit?	Representative required?	Approximate recovery time (months)	Surrender of original invoices required	Proof of payment needed	Certificate of registration required
Belgium	30 June	yes	6	yes	no	yes (original)
Bulgaria	30 September	no	4	no	no	yes (original)
Czech Republic	30 September	no	6	yes	no	yes (original)
Denmark	30 September	no	3	yes	no	yes (original)
Germany	30 June	no	6	yes	no	yes (original)
Estonia	30 September	no	4	yes	no	no
Ireland	30 June	no	0	yes	yes	yes (original)
Greece	30 June	no	6	yes	yes	yes (original)
Spain	30 September	yes	6	yes	no	yes (original)
France	30 June	no	3	yes	yes	yes (original)
Italy	30 June	no	6	yes	no	yes (original)
Cyprus	30 September	no	4	yes	no	yes (original)
Latvia	9 months	no	4	yes	yes	yes (original)
Lithuania	30 June	no	4	yes	yes	yes (original)
Luxembourg	30 June	no	6	yes	no	yes (original)
Hungary	30 September	no	4	yes	yes	yes (original)
Malta	9 months	no	4	yes	yes	yes (original)
Netherlands	30 June	no	6	yes	no	yes (original)
Austria	30 June	no	6	yes	no	yes (original)
Poland	30 September	no	6	yes	no	yes (original)
Portugal	30 September	yes	0	yes	no	yes (original)
Romania	30 September	no	6	yes	yes	yes (copy)
Slovenia	30 September	no	4	yes	no	yes (original)
Slovakia	9 months	no	6	yes	no	yes (original)
Finland	30 June	no	3	yes	no	yes (original)
Sweden	30 June	no	3	yes	no	yes (original)
United Kingdom	9 months	no	4	no	no	no

Source: http://www.agn-europe.org/htm/firm/news/ttf/2011/2011_vat_web.pdf

2. Directions for VAT system improvement from EU

On 1st December 2010, the European Commission adopted a Green Paper on "The future of VAT – Towards a simpler, more robust and efficient VAT system"[2]. The purpose of the Green Paper was to generate a comprehensive debate with all interested stakeholders (businesses, academics, citizens, tax authorities) regarding the assessment of actual VAT system and possible modalities to enhance its coherence with the single market and its capacity to mobilize revenues, reducing at the same time the VAT compliance cost.

The Green Paper deals especially with the way of approach of cross-border transactions as well as other essential aspects related to VAT neutrality, the necessary degree of harmonization on the single market and decrease of bureaucracy.

One of the VAT essential aspects is the **principle of neutrality**. As VAT is a final consumption tax, companies shouldn't bear the VAT payment burden. As a result, Member States should ensure, in principle, the taxation of all commercial transactions and similar goods and services should be treated similarly.

Regarding intra-community transactions, the actual VAT system diverged from the initial commitment of Member States to apply the principle of origin, for lack of political support between Member States regarding cooperation in view of application of this principle.

A VAT system based upon the **principle of destination**, not only in case of goods but also in case of services seems to be a pragmatic and feasible solution.

According to the Communication released by European Commission as a result of the public debate of the Green Book,[3] the result of the proposed reform should be a VAT system with three attributes.

First, VAT must be made more workable for businesses. It should exist one single set of clear and simple rules regarding VAT (an EU VAT Code), which to be applied in case of a taxable person who develops its activity in many EU states; such a person should deal with tax authorities from one Member state. Among the measures envisaged for a more business-friendly VAT are expanding the one-stop-shop approach for cross border transactions, standardizing VAT declarations and providing clear and easy access to the details of all national VAT regimes through a central web-portal.

Second, VAT must be made more neutral and efficient in supporting Member States' fiscal consolidation efforts and sustainable economic growth. Broadening tax bases and limiting the use of reduced rates will generate new revenue or will allow the standard rate reduction without decreasing the revenue. The Communication sets out the principles that should guide the review of exemptions and reduced rates. Neutrality imposes equal rules regarding the right of deduction and very limited restrictions regarding the practising of this right.

Third, the huge revenue losses that occur today due to uncollected VAT and fraud need to be stopped. It is estimated that around 12% of the total VAT which should be collected, is not. Modern methods of VAT collection and monitorization should maximize the revenue practically collected and limit or even eliminate fraud. Besides the facilitation of legislation observance by companies, local tax authorities should concentrate upon risky behaviours, aim to combat frauds and finally to

[2] http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/future_vat/com(2010)695_en.pdf

[3] http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_ 2011_851_en.pdf

act collectively as European authority. An intensified, automatic and fast information exchange between national tax administrations will be vital in achieving this goal.

Conclusions

Value added tax constitutes an important source of revenue for national budgets of Member States. Consumption taxes are considered to be a more stable revenue source, and more growth-friendly, than certain other taxes such as profits and income. Therefore many Member States have recently increased their VAT rates as part of their consolidation efforts.

The VAT legislation is regulated at the community level, but the necessary time to observe the tax liabilities comprised in the VAT legislation varies depending on different administrative used practices. For example, the observance of tax liabilities regarding VAT needs 222 hours in Finland and 288 in Bulgaria.[4]

With different local VAT regulations and foreign languages assessing the compliance of some operations, preparing and submitting VAT declarations can be complicated and time consuming for companies involved in European cross-border operations.

Business environment needs clear norms as regards VAT which grow the juridical degree of security and the probability that these norms be interpreted uniformly in Member States. Actual Council directives comprise inaccurate dispositions which increase the possibility of interpretation while the complex VAT system thus created prevents the cross-border activities and generates useless administrative charges.

The objective of Commission initiative, under the form of the Green Book, is to create a „simpler, stronger and more efficient" VAT system which is more transparent and focused on a close collaboration and exchange of best practices between Member States with the observance of subsidiarity principle.

A simpler, more harmonised VAT system, more adapted to modern business models and new technologies, would create a better environment for business and a more attractive market for investment.

References

- M. Z. Grigore, M. Gurău, *Fiscalitate. Noțiuni teoretice şi lucrări aplicative*, Cartea Studențească Publishing House, Bucharest, 2009
- http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2011/report_2011_en.pdf
- http://www.vatsystems.eu/index.php/news/show_prev_news/12/2011
- http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/traders/vat_community/vat_in_ec_annexi.pdf
- http://www.agn-europe.org/htm/firm/news/ttf/2011/2011_vat_web.pdf
- http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/future_vat/com(2010)695_en.pdf
- http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf
- http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

[4] http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

OVERVIEW OF THE COMPANY'S FINANCIAL STRUCTURE

Viorica Mirela STEFAN-DUICU[*]

Abstract

The purpose of the paper is to highlight the fact that the company's financial structure is, empirically speaking, the parent entity from which starts all the activities that generate the self existence of the company. The company's financial structure also known as the company's capital structure conducts directly the organizational and inter-organizational behavior and indirectly the classification on the market of the referred economic agents. This paper aims to describe the factors that influence the company's financial activity, it's direct and related sources of funding used to maintain or increase a satisfying turnover and the theories that conduct the company's capital structure.

Keywords: *financial structure, company, economic agents, capital, turnover*

Introduction

The financial structure of the company reflects the composite formation of the capital that can be borrowed and represents the ratio between the short and long term financing.

The financial structure of the company generated countless disputes along the theories of classifications of companies in the market, theories regarding the financing resources of an enterprise and the organizational and inter-organizational behavior of the direct participants in the economy.

Over the time informational frames were formed regarding the necessary theories for companies classification in the market, theories regarding the financing sources and also debates, critics and additions to the financing decisions as in practice and in theory.

The first economic representation of a company has been shaped by the neoclassic model and started from the ideas promoted by Adam Smith in 1776 regarding the fact that individual focused interests pursuit should lead to a common interest. The neoclassic theory regarding the economic balance, partial and global, as Prof. Ion Stegaroiu said, is considered to be the best finalized representation of market economy functioning, where the company has the central role.

The traditional model includes a number of significant features of the analyzed environment, as follows: the description of balance conditions in the perfect competition context, characterized by the atomicity of participants (the existence of a high number of buyers and sellers whose volume of individual exchange is negligible compared to the overall volume of trade), the product homogeneity (the suppliers trade identical goods, so the buyers are indifferent to the identity of the seller), free and transparent market entrance (the traders are perfectly informed regarding the price and quality of products) and the individual rationality principle.

In the neoclassic theory, the company is seen as an entrepreneur expressing its own will (the atomicity feature) who, eventually, will seek the maximization of profit (rationality feature), promoting its product (the homogeneity feature) to a group of perfectly informed buyers (economic transparency feature).

[*]Assistant Lecturer, Faculty of Economic Sciences, "Nicolae Titulescu" University, Bucharest, Romania (email : chirita.mirela@gmail.com).

The neoclassic reasoning has many advantages and has been considered over time to be eloquent and relevant. The advantages are extremely important and regarding the theoretical possibility of seeing the optimal conditions thorough which the producer has at disposal an important analyzing mechanism that adds to its management instrument (break-even, elasticity, productivity, etc.) that permit the identification of maximum profit opportunities.

The neoclassic theory has been often criticized and labeled unrealistic, bringing the argument that the existence of a platform which has all of the offers and requests centralized is rarely seen. Another argument brought is that the theory is dedicated to the market efficiency issue, without considering the cost of its operation.

Despite the criticism, the issues addressed by this approach cannot be totally rejected. Over time the assumptions were reconsidered, retreated, adapted to the existing market model, leading to other theories that have been guiding the competitive environment and the economic activity both to microeconomic and macroeconomic level.

Goods homogeneity assumption was shaped in a different manner by E. H. Chamberlin who proposed a monopolistic competition analysis through which "every supplier has absolute monopoly over his product, but it is subjected to competition by more or less substitutable goods"[1].

The assumptions of individuality, subjected to a new analysis by A. A. Berle and G. Means highlighted the property exclusion from the company's management.[2]

The principle of rationality has known a conceptual retreatment proposed by H. Simon[3] namely the addition in the neoclassic model of the bounded or procedural rationality concept over the perfect rationality, starting from an economic behavior analysis implicated in decision taking processes, given the substitution of the profit maximization principle with the satisfaction principle, so, the individual can be pleased with a satisfactory decision and not necessarily with an optimal decision so it is taken to consideration that the individual does not seek the higher earning but the acceptable solutions.

Comparing the perfect rationality with the bounded one, we can observe that the perfect rationality is founded both from decisional processes results and objectives and the means to achieve them aprioristic, while the bounded rationality is based on decisions taking procedures and the objectives and means to achieve them are settled as reference base and as research results.

Based on the new framework created by the introduction of new notions used above, J. G. March and H. A. Simon (1958) [4] and R. M. Cyert and J. G. March (1963) proposed a contractual and behavioral model of the company as a productive organization which consisted in a coalition of individuals that contribute to the well functioning of the organization in exchange of a satisfying payment. By combining the production elements and highlighting the managerial art involvement, the organizational practices are highlighted and they lead into a more general model that takes into account the economic efficiency, to the contractual theory. The purpose of this theory consists in describing the exchange relationships between the parts taking into consideration the institutional and informational restrictions that govern them.

As alternative approaches to the attempt to eliminate the contractual theory's inadvertences, the conventions economy and the evolutionary economy emerged.

The conventionalist approach states that the company is a conventional framework, therefore a convention that defines working in common and the market as a qualification convention

[1] E. Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value*, Harvard University Press, 1933, 1965, 8th ed.

[2] A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (2nd edn Harcourt, Brace and World, New York 1967).

[3] Simon, Herbert, *Bounded Rationality and Organizational Learning*. Organization Science 2 (1): 125–134.

[4] March, James G., *A Primer on Decision Making: How Decisions Happen*. New York: The Free Press.

that defines the exchanges trough which the consumer has the role of expressing its wishes and the company has the role of answering to them.

The evolutionary approach tries to settle the way that different behavioral model are perpetuated over time and aims to decipher and understand the processes involved in all the evolutional stages both at technological and organizational level.

This kind of evolution leaded to the renewal of microeconomic analysis instruments, as the finality to the new theory emerged – The Theory of Games.

The Theory of Games was introduced into economy by John von Neumann and Oscar Morgenstern[5], both of them defining the game: "the game is simply the totality of the rules which describe it". Taking into consideration that this description can be applied to any type of phenomenon, the Theory of Games has found a series of uses in both the social and economic domains, distinguished from other theories by the pronounced mathematic character.

The base assumption of the Theory of Games is the assumption that includes the rationality of players, according to whom each player has as purpose the maximization of his own earnings. These earnings depends both on his and others decisions. The main approach consists of the assumptions and questions that each player will ask himself: what will others do? This is the only question available because another essential assumption of the Theory of Games is based on the fact that each player has a complete set of information: each player has information on the game and other players – common knowledge, except for their decisions, the only issue being the right anticipation of these decisions. Theoreticians signaled situations where the players do not take into consideration various characteristics of the game, this being the complete informing situations. If the information is not completely defined, in its minutest details, then the theory is not relevant.

The result of the Theory of Games and economic information lead over time to the contractual theories that have as purpose the description of inter-agents exchange relationships taking into consideration all the institutional and informational restrictions in which they fit at evolutional level. Punctually, the contractual theories can be used to describe the applied strategies in negotiating contracts, as in substantiating the finance, management, marketing and other decisions. In these theories, the company is considered a perfect framework that incorporates a perfect network of contracts, policies and agreements between the component individuals. Inside the contractual theories we also find the Positive Theory of the Agency based on the article "Theory of The Firm: Managerial Behavior, Agency Costs and Ownership Structure" published by M. C. Jensen and W. H. Meckling in 1976" [6]. Founder's initial concern of the Positive Theory was to show to the managers an analysis pattern that will allow understanding the degree of the organizational structure involvement in the performance in order to shape the actions and the decisions in this way.

The presentation of the above mentioned theories aimed to highlight the initial microeconomic framework, which trough the adhesion at a dynamic economic environment in a continuous evolution scale, emerges to new approaches of the important issues of financial microeconomics, namely the issues regarding the company financing and optimal capital structure selection.

In 1985 M. Miller and F. Modigliani[7] sustained the famous theory under which the value of the company is independent from the means of financing, theory criticized for its restrictive assumptions that, over time has been enriched and as a result brought in foreground the reflections

[5] John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior*, Princeton University Press (1944).

[6] Jensen M. C., Meckling W. H., *Theory of the firm: Managerial behavior, agency costs and ownership structure*, Journal of Financial Economics, vol. 3, 1976.

[7] Modigliani, F.; Miller, M. (1958), *The Cost of Capital, Corporation Finance and the Theory of Investment*, American Economic Review 48 (3): 261–297.

centered on the financial structure selection throughout the systemic principle of arbitration between costs and advantages of different financing sources.

New microeconomics theories have removed two hypothesis of the classical scheme: the symmetry of information for all agents and the identity of their interests (income maximization or company's value). Regarding the financing principles, the Theory of Signals shows that the level of indebtedness can serve as a signal from the managers to their external partners, fact that can determine the balance for each financial structure. The Theory of Agency states the indebtedness as a solution to the conflict of interests between the managers and shareholders mentioning that it can also cause other conflicts (between the managers and shareholders on one hand and creditor on the other hand).

The classic company financing scheme, with the perfect market assumption and maximizing company's value behavior for the financial market can be highlighted trough two essential ideas. The first idea refers to the fact that enterprises do not use self-financing for net investment but the depreciation fund installments for the corresponding amount for replacement investments, distributed as dividends for shareholders and use external capital to finance their net investments. The second idea underlines the fact that companies have two external sources of financing: increase of share capital by shares issuing and credit indebtedness[8]. The issue of finding the advantageous financing sources was brought up, thereby the answers to M. Miller and F. Modigliani's theorems. The first theorem can be enounced as follows: for the given class of economic or exploitation risk, the market value of the company (the sum of equity and expenses) is independent to the financial structure, in these conditions the average weighted cost and company's value are constant. The second theorem states that the investment decisions are independent to the financing decisions.

Criticisms of the classic scheme are presented as three aspects: the purpose of self-financing, heterogeneous character of external financing sources and the real issues of indebtedness[9].

The purpose of self-financing refers to the fact that depreciation funds allow financing a part of the growing investments by the game of multiplication effect – Lohmann-Rüchti effect and by keeping a part from the net result inside the company, underlining the important part of self-financing in financing the growth and replacement investments.

The heterogeneous character of external financing sources refers to the heterogeneity of loaning or cash intake from shareholders. About the increase of share capital method of external financing, it has been observed that unlisted companies cannot use the same conditions used by the listed ones.

The issues of real indebtedness limits that are referred in the theorem of independent company value in relation to its financial structure is knowing why the companies are not totally indebted and why in reality certain companies indebted more than other, even if belongs to the same class of economic risk. M. Miller and F. Modigliani solved this problem, proving that companies choose to maintain a certain capacity of indebt to benefit from flexibility.

Empirical studies showed that the classic scheme doesn't provide answers to lots of questions that are subject to actual concerns at company's financing, but financial neoclassicism, trough the Theory of Agency and the Theory of Signals brings not only answers but real solutions to solving the optimal financial structure issue. The Theory of Signals begins from the assumption that markets are rarely in balance and the obtained information has a defined cost criteria conducting to different delivery times to the managers. Having this theory as basis, the managers of a company can have access to information that investors cannot, hence the interest of obtaining information before others do. This activity can sometimes be misinterpreted because of manager's opinion, unfounded and

[8] *Encyclopédie de gestion*, vol. II, Economica, p. 1223, 1989.
[9] Perez R., *Grande entreprise et système de financement*, in Mélanges offerts à P. Vigreux, Toulouse, 1981.

exaggerated optimism leader of hidden advantages. The signal is actually a financial decision with negative consequences for the one launching it, in this case the one who tries to send erroneous message. The Theory of Signals analyses the company's financial decisions – financing policies, dividend distribution policies, indebtedness policies, repurchase of shares policies, etc., as signals from managers to investors.

Indebtedness policy explains why an increase of liabilities means an increase in the company's risk. Managers of companies from this situation send information that authorizes the market to believe that the company's performance will allow reimbursing this debt without difficulties. If the signal is false, the following sanctions can even discharge the managers if taking into consideration that the company will be in difficulty at the reimbursement time, this means that the managers are stimulated, most of times, to send correct signals.

The dividends distribution policy transmits information regarding several studies that demonstrate the managers are reluctant to decrease of paid dividends. Distributions of dividends is interpreted as a positive signal sent to market, centered on the idea that managers believe that the performance evolution of the company will allow to maintain current dividends in the following years, or even increase the amount. Otherwise, a decrease of dividends has a negative signal impact, noticing unclear perspective to the evolution of the company.

If the Theory of Signals reconsider the classic premesis regarding the uniform spread and accesibility of information, the Theory of Agency reconsider the premesis by which the company has as sole representative the share holder manager, claiming that the company can solve conflict by completing a contractual relationship network, company's behavior being now incomparable to the market's, meaning it represents the result of a complex balancing process.[10]

Conclusions

The financial structure of a company will always rise issues of specific capital components, of their nature, considering that from the first theories until present, their studying will know a large expansion in interest granted by the factors influencing the financial structure - meaning the assets structure, sales stability, manager's behavior, internal climate and the financial market conditions, taxation and low trust in banking institutions.

The own funds/borrowed funds controversy, developed by finance theoreticians who tried to find the optimal liabilities structure is vaguely found in the practice because the practitioners are more interested in the conclusions of the Theory of Signals, for which a viable enterprise borrows and manages to repay at term [11] and the conclusions of the Theory of Agency who's originality consist of rejecting the convergence assumption in the interest of all partners of the company.

Concluding, the traditional approach shaped by M. Miller and F. Modigliani resumes to the fact that in the presence of income tax, the value of an indebted company is equal to the value of a company without loans with the addition of the economy of income realized from indebtedness. The Theory of Agency approach reflects on the fact that the optimal financial structure results from a compromise between various ways of financing that allows solving those conflicts of interest, considering that indebtedness and equity attenuates some conflicts and starts other ones.

[10] John von Neumann and Oskar Morgenstern: *Theory of Games and Economic Behavior*, Princeton University Pres, 1944.

[11] M. Glais, *Le diagnostic financier de l'enterprise*, Paris, Economica, 1984.

References

- A. A. Berle and , *The Modern Corporation and Private Property* (2nd edn Harcourt, Brace and World, New York, 1967).
- C. Munteanu, A. Horobet, *Finante transnationale: Decizia financiara in corporatia moderna*, Ed. All Beck, Bucuresti, 2005.
- E. Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value*, Harvard University Press, 1933, 1965, 8th ed.
- *Encyclopédie de gestion*, vol. II, Economica, 1989, p. 1223.
- I. Stegaroiu, *Economie industriala- O abordare epistemologica*, Ed. Bibliotheca, Targoviste, 2004
- I. Stancu, *Finante – Teoria pietelor financiare, finantele intreprinderilor, analiza si gestiunea financiara*, Ed. Economica, Bucuresti, 1997.
- Jensen M. C., Meckling W. H., *Theory of the firm: Managerial behavior, agency costs and ownership structure*, Journal of Financial Economics, vol. 3, 1976.
- John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior*, Princeton University Press (1944).
- M. Grigore, *Noua Microeconomie*, Ed. Universitara, Bucuresti, 2005.
- March, James G., A Primer on Decision Making: How Decisions Happen, New York: The Free Press.
- Modigliani, F.; Miller, M. (1958), The Cost of Capital, Corporation Finance and the Theory of Investment, American Economic Review 48 (3): 261–297.
- M. Glais, *Le diagnostic financier de l'enterprise*, Paris, Economica, 1984.
- Perez R., *Grande entreprise et système de financement*, in Mélanges offerts à P. Vigreux, Toulouse, 1981.
- Simon, Herbert, *Bounded Rationality and Organizational Learning*, Organization Science 2 (1): 125–134.

THE IMPACT OF MANAGEMENT CONTROL ON THE HUMAN FACTOR AND CONSEQUENTLY ON ENTERPRISE PERFORMANCE

Nicoleta Cristina MATEI [*]
Marin ȚOLE [**]
Dumitru Mihai NEDELESCU [***]

Abstract

The current economic environment where enterprises run their activities is characterized by diversified, competitional supply, superior to the demand; a supply that is heterogenous, unstable both quantitatively and qualitatively; comprising numerous technical as well as technological mutations. Under these circumstances, enterprise managers must ensure the achievement of objectives and performance. In order to accomplish these, human, financial, material resources are to be used. The limits imposed by the usage of financial and material resources can be compensated for by means of the creativity and innovation pertaining to employees, therefore, the success of an enterprise becomes closely related to the capitalization of staff intelligence and skills, while the human resource becomes important for the management control by means of which an enterprise makes sure that its activities run according to plan and that objectives are met. The paper presents the impact of management control on the human factor and further to the enterprise performance, strategies of employee motivation, aspects regarding the use of plans as objectives, as well as aspects concerning the use of control techniques regarding the assessment of results.

Keywords: *performance, management control, control techniques, strategies of employee motivating.*

Introduction

The main objective of an enterprise is performance, creating added value, i.e. a positive value obtained from the running of activities after the remuneration of all participant factors, including the enterprise capitals.

'Performance […] can have at least three meanings or connotations: success, the result of an action or the action itself […]. Performance shows capacity for progress, due to constant efforts. The term performance is the bearer of an ideology of progress, effort, of always striving for the better.' (A. Bourguignon, 1997)

For an enterprise to be performant, it needs to set up and have the capacity to reach strategic objectives by means of efficient usage of all current means, or, to put it differently, to be simultaneously efficient and efficacious.

Reaching strategic objectives can be achieved by doing certain activities by the enterprise employees under the managers' guidance. 'The process meant to motivate and incite the people in charge into doing activities conducive to the reaching of organization objectives' is management control. (R.N. Anthony, 1965)

[*] Senior Lecturer, Ph.D., "Nicolae Titulescu" University, Bucharest, Romania, (e-mail: cmatei@univnt.ro).
[**] Professor, Ph.D., Romanian-American University, Bucharest, Romania,(e-mail: tole.marin@profesor.rau.ro)
[***] Senior Lecturer, Ph.D., Romanian-American University, Bucharest, Romania, (e-mail: nedelescumihai@yahoo.com)

The creation of affluence involves the consumption of material, financial, human and informational resources. Human resources are the ones making the difference between enterprises having similar financial and material resources because of the employees' educational and professional qualifications, skills, abilities and knowledge that can be turned into value, thus influencing the enterprise profitability in the long run.

Transforming employee knowledge into value also depends on the managers' capacity to influence their subordinates' work and guide them into reaching the objectives.

Contemporary Japanese management considers that the success of an enterprise is closely related to putting to good use of the intelligence of every employee.

In order for the enterprise of the future to continue its activity and be performant it will have to focus, among other things, on the degree of employee satisfaction so as for the latter to enjoy work and be committed to it.

'The enterprise's human elements are the ones able to learn, change, innovate and create if they are rightly motivated, being the ones that ensure the company survival in the long term'. (N. Bontis et al.,1999)

The right motivation, the use of the intellectual capacities of the personnel with a view to reach the objectives will ensure both the survival of the enterprise as well as the creation of value. Pursuing the reaching of objectives and the setting of employee motivation strategies can be achieved by means of management control.

This study objectives are to present the role of management control in the creation of value, the results' assessment, personnel motivation strategies and the indicators proposed to be used as performance evaluation instruments.

1. Management control and its role in creating value

Managers of any enterprise consider three parameters when running the business: objectives, means and results.

Objectives must correspond to the the aims pursued by the enterprise in the long run. Means are represented by the resources used in the running of objective-reaching activities, and the results represents the consequences of the actions undertaken in order to reach the ojectives.

There is an interdependence relation between objectives, means and the results obtained by enterprise. Objectives are set in accordance to the means available to the enterprise as well as to the expected results, means will be allotted depending on the objectives settled and the results pursued, while the actual results will be the consequence of using the means efficiently and efficaciously. At the same time, the results obtained will be compared to the initially settled objectives in order to find out the deviations or the degree of achievement of the latter.

"The process by which people in charge make sure that the necessary resources are obtained and used with full efficiency and effectiveness in order to reach the objectives set by the enterprise"[1] is management control. Therefore, the role of management control is to ensure the correlation of the objectives to the resources; to set up a system of indicators that would allow the decision-makers to monitor the evolution of the enterprise; to adjust the behaviour of the factors with a view to reach the objectives.

"Management control helps the managers to guide the actors into getting organized for performance." (C. Alazard, S. Sépari, 2001). Consequently, management control urges the people in charge to act as the enterprise needs, to use the means available in order to reach the objectives settled, to assess the results of the activities undertaken and compare them to the ones initially settled,

[1] **Dictionnaire fiduciare, organisation et gestion**, La villeguerin Editions, Paris, 1991, p.9

and if the former are not up to the expectations, to take corrective steps so as the global activity may ensure the creation of value.

Management control does not have the role to sanction, but to recommend, suggest, notify. Thus, the control system will be regarded as an assistant to the managers and not as a supervisor.

The purpose of management control is the provision of information useful to the managers' decisions. The information will be synthesized and presented by control panel boards, scorecard balances, various reports, depending on the informational needs of the management of the enterprise and it has to meet the following characteristics: to offer a representation as faithful as possible to the reality; to be provided in due time; to indicate all the elements that would allow the decision-making process; to be adapted to the issue under investigation; to be accessible**.**

Management control by means of its instruments mentioned above (control panel, scorecard balance, reports, etc.) informs the management with respect to the way in which the resources are used and the objectives are reached, thus contributing to the decision-making with the view to create value. It is equally a system of regulating the behaviours of the enterprise employees and guiding them towards performance.

2. Control techniques and results evaluation

Results evaluation involves the comparison of the objectives settled to the actual achievements and if applicable, the finding of deviations. It can be achieved by using the budget control and the control panel.

"Budget control represents one of the management control techniques that allows, by starting with a decentralization of responsibilities, the existance of a control in the framework of a budgetary exercise (generally one year), of the whole system of enterprise activities, translated into monetary units. It consists of a permanent comparison of results and objectives, in order to:

- Look for the differences'causes;
- inform the various hierarchical levels;
- take the necessary corrective steps or exploit the favorable differences;
- appreciate the activity of the budgetary managers." (C. Alazard, S. Sépari, 2001).

Monitoring the activity of the enterprise and comparing its results to the objectives in the framework of the budget control implies the existence of budgets.

The budget, as a provisioning document, is elaborated over the period of one year and it settles the allotment of resources to each department, sector, centre of activity in the enterprise. It equally influences the ones using it by means of the responsibilities of each one.

The budget does not have a standard form, it can feature various forms and contents according to the informational needs of the persons using it and the professional judgement of the specialists that draw it up. However, the information supplied needs to be presented in a logical order, neither too numerous since it might affect the meaning and exactness of the data, nor too scarce because it might lead to the incurring of expenses too low or too high due to the user's lack of perception of the limits presented in the document.

By means of budgets, the management control seeks to obtain data with the purpose to know, plan and understand the important events that have an impact on the enterprise. At the same time, the indicators calculated and presented in the budgets help to assess the efficiency of the activity run by the budgetary centre, as well as its performance, allowing the evaluation of the results of the managers'actions and, at the same time, of the behavioral influence of the management control over the actors.

The evaluation of the results of the activity of an enterprise can be done by means of the control panel – an instrument measuring the performance and whose construction starts from „ the

mission, vision and the key factors of success". (M. J. Epstein and J. Manzoni, 1997; L. Vilain, 2003).

The control panel gathers and presents a system of indicators linked by the important decisions and objectives of the enterprise and, at the same time, it makes comparisons between targets and achievements, highlighting the differences. „Highlighting deviations for the significant indicators and their analysis allows the identification of sideslips, errors and it represents a prior condition for the correction of the enterprise trajectory and of the modification of the enterprise projects". (N. Albu, 2005)

The indicators presented in the control panel allow the people in charge to know the evolution stage of the activity centre they run, future trends and therefore to take decisions regarding the corrective steps with a view to reach the settled objectives.

The results obtained by various centres of activity are actually the results of the activity of the employees, and the level of the indicators calculated and presented in budgets or control panels represent the degree of their performance. Consequently, budgetary control techniques are useful, among other things, for the employee evaluation which needs to be correct, fair, and made with the purpose to motivate, to stimulate them towards reaching the strategic objectives.

3. Employee motivation

Performance is built by permanently monitoring the activity, comparing the objectives and setting up the corrective measures. This action involves, among other things, the analysis and guidance needed for the human behavior to reach the expected results.

Management control participates to the process of analyzing human behavior by providing information regarding its results by means of the indicators calculated and presented in various instruments (control panel, budgets, reports, etc.). At the same time, management control participates to the process of guiding the employees' behavior by motivation.

A motivated employee is an employee who will contribute to the creation of value, to the enterprise's increase in performance. Thus, an enterprise that wishes to be perfomant must be interested in the employee degree of satisfaction.

Under the current economic context, namely the economic crisis, not only will material incentives not be offered on a continued basis, but they will fail to motivate employees in the long run. A big remuneration does not necessarily make an employee enjoy doing their activity and contribute to it by working more and better for the increase in performance of the enterprise, but it is the work environment, the relations with the superiors or peers that will achieve this.

Motivating every individual to reach the set objectives represents the managers'or the activity centres'duty, sometimes as a consequence of the notifications issued by the management control after signaling deviations.

Stimulating employees by management control could be achieved by means of:

- evalutions and fair incentives, not necessarily monetary;
- organizing management control in a flexible way that would allow decentralization, a certain degree of autonomy and initiative on the part of the managers in setting up the objectives assumed by the centre they run;
- dialogue, permanent communication between the management and the operational personnel regarding the achievements and the objectives to reach.

Involving the employees in setting the objectives makes them more responsible and motivated to reach them.

At the same time, the perspective of long-term career development, the promotion of values can represent methods of stimulating the increase of employee performance and, consequently the enterprise performance.

Management control is a system of subsequent decisions that need to focus on the active participation of employees with a view to setting up the objectives, by motivating employees and thus leading to the manifestation of an invisible control model.

4. Indicators regarding human resources to be pursued in the performance measuring instruments

The development of human resources by lifelong learning, the involvement in the setting of objectives, the making of decisions regarding the corrective measures to be taken when non-favorable deviations from objectives' achievements are recorded, generates value for the enterprise. This value involves the definition of a set of indicators to be pursued in the framework of performance measuring instruments (C. N. Albu, 2008) as it follows:

❖ indicators targeting productivity:

• value added as percentage from the remuneration cost – offers a more faithful representation of the productivity of each employee;

• the level of implicit knowledge per employee – knowledge inside an enterprise appears and develops as a result of social interactions that transform individual knowledge into collective or implicit knowledge, and the latter are the ones on which the organization can build competitional advantages. The indicator measures the degree in which the enterprise manages to incorporate knowledge;

• the relative increase of individual knowledge compared to the formation costs – it represents a degree of the enterprise concern for the preservation of a certain level of knowledge;

❖ indicators targeting processes:

• degree of communicating the strategic information;

• life-long learning – the employee participation to life-long programs reflect the degree of commitment for increasing or at least maintaining the level of their professional knowledge;

❖ indicators targeting employees:

• the degree of employee preservation – a high level of the indicator reflects a good working environment that will contribute to the employee motivation and the increase of performance;

• the employee satisfaction – considers the acknowledgement obtained by the employees for the work done, the acccess to the necessary information necessary for work, the employee involvement in the decision-making process;

• the degree of current employees preservation - this indicator can be used together with the degree of employee preservation in order to find out the extent to which their loss would have a negative effect on the enterprise's capacity to raise the value of its implicit knowledge;

❖ indicators targeting the financial aspects:

• the value of the employee knowledge;

• knowledge per employee – offers information both on the employee perception on the knowledge formation and development process, as well as on the quality of human resources management;

• employee knowledge as percentage of the total number of assets – offers information regarding the importance held by human resources in the whole system of the enterprise resources.

The above mentioned indicators can be used both for establishing the value of the employee knowledge for the enterprise, and the degree of satisfaction and involvement in obtaining performance.

Conclusions

In the current economic context where a wide ranging supply exceeds the demand and consumers are losing purchasing power, it can be said that it is not the enterprises that select their customers, but the latter choose the former.

It is customers that choose to buy the goods and services that cater to their needs and that offer the best quality-price balance.

Customers' income represents the revenue source for the enterprises as well. Therefore, in order to survive and create value it is essential to keep the current customers and attract new ones, and consequently enterprises will set up certain objectives which they are going to try to reach under efficient circumstances.

Reaching the objectives involves the use of the means available to an enterprise at a certain time. The most important resource used in the running of its activity by an enterprise is made up of the human resources and, more acurately, their knowledge, educational and/or professional qualifications. The more an employee is motivated the more they contribute to the increase of the organization performance. Consequently, enterprises must monitor the deviations of the achievements from the initially established targets and motivate the employee with a view to reach the strategic objectives. Deviations' monitorization is made by management control techniques like budgetary control, but also by means of the control panel which equally allow the managers of activity centres to know their level of evolution and implement corrective measures, if unfavorable deviations are ascertained.

To conclude with, management control has a significant role for the motivation of the employees of an enterprise with a view to reach the strategic objectives and create value. Management control should feature certain indicators in its performance-measuring instruments that would show the degree of employee satisfaction as well as the impact of the latter's knowledge over the enterprise performance.

References

- Albu C. N., *Measuring Performance-Indicators for the Intelectual Capital Management,* Accounting, Business Expertize and Audit, no. 10/2008
- Albu N., *A Contingent Approach of the Use of Strategic Managerial Accounting Instriuments,* Bucharest, 2005
- Bontis N., Dragonetti N.C., Jakobsen K., Roos G., *A review of the tools available to measure and manage intangible resources*, European Management Journal, vol. 17, no. 4, 1999
- Bourguignon, A., „*Sous les pavés la plage…ou les multiples fonctions du*
- Caraiani C., Dascălu C., "*Managerial Accounting: Integrated Accounting Technologies of Reporting and Decision",* A.S.E Publishing House., Bucharest, 2010
- *Dictionnaire fiduciare, organisation et gestion*, La villeguerin Editions, Paris, 1991
- Dumitrana M., Caraiani C., "*Management Control*", Universitară Publishing House, Bucharest, 2010
- Epstein, M. J., Manzoni, J. , „*Balanced Scorecard and Tableau de Bord – translating strategy into action*, Management Accounting, August, 1997 *prospectif"*, *thèse professionnelle*, Mastère Spécialisé HEC, Ecole des Mines de Paris, 2003
- Vilain, L. , *„Le pilotage de l'entreprise : l'utilisation d'un tableau de bord vocabulaire comptable: l'exemple de la performance",* Comptabilité, Contrôle, Audit, March, 1997.